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34th Report of the Judicial Council

Advisory Reports on Matters Requested by the Legislature

(See Complete Table of Contents)

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Massachusetts Law Quarterly

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NEW ENGLAND LAW INSTITUTE
Saturday Lectures for 1959

Dates	*Topics*
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May 2	Federal Practice
May 9	Drafting of Wills and Trusts

Questions are continually being asked by general practitioners of the experts in these fields. These questions, *and questions which ought to have been asked,* will form the background of preparation and coverage of "What the General Practitioner Should Know About Them."

Each session will be presented as a separate project of the Institute and will include a review covering statutes and decisions—Federal, Massachusetts, and other New England States—which have made changes in each field during recent years.

Sessions will start at 9:00 a.m. and conclude at 12:30 p.m. at Boston College Law School. Luncheons will be served at 12:30 at the Law School. Luncheon is optional,

and is not included in the registration charge. Session Outlines, according to the Institute's usual custom, will be distributed at the beginning of each session.

Registration can be made either for transferable "bearer" tickets ($20.00) covering all the sessions in the series, or for single individual sessions ($5.00 per session). Detailed announcements and registration blanks can be obtained from New England Law Institute, Inc., 6 Beacon Street, Room 723, Boston 8.

SUFFOLK UNIVERSITY LAW SCHOOL GRADUATE DIVISION—COURSES FOR LAWYERS

Commencing Monday, February 2, 1959

Each Course will consist of 30 class hours of 50 minutes each, and is open to members of the Bar, law school graduates, and other persons qualified for participation by virtue of occupation, training or experience.

WORKMEN'S COMPENSATION: The purpose and scope of the Massachusetts Workmen's Compensation Act; problems arising in the handling of claims before the Industrial Accident Board and the courts, from the viewpoint both of the employee and the insurer, with emphasis on practical and procedural matters.

THOMAS A. L'ESPERANCE, JR., LL.B., Boston College; *Trial Counsel, Liberty Mutual Insurance Company, Boston.*

TUESDAYS, 6:00 TO 7:50 P.M.

TRIAL AND APPELLATE PRACTICE: A practical approach to the trial of cases in the courts of Massachusetts, covering commencement of actions, pleadings, discovery, motions, exceptions, requests for rulings and for instructions, report and reservation, appeal, preparation of record for Supreme Judicial Court and preparation for appellate argument.

W. LANGDON POWERS, LL.B., Harvard University; *Sherburne, Powers and Needham, Boston; former Assistant District Attorney, Middlesex County; former First Assistant United States Attorney.*

THURSDAYS, 6:00 TO 7:50 P.M.

JURISDICTION AND JUDGMENTS: A study of the jurisdiction of state and federal courts, original and appellate; venue and change of venue; the territorial extent of jurisdiction; the invoking of original jurisdiction; conclusiveness of and attacks upon judgments.

JOHN E. FENTON, JR., LL.B., Boston College, LL.M., Harvard Unversity; *Associate Professor of Law, Suffolk University.*

MONDAYS & WEDNESDAYS, 6:00 TO 6:50 P.M.

ESTATE PLANNING: An examination and integration of the use of inter vivos gifts, revocable and irrevocable trusts, forms of concurrent ownership, powers of appointment, insurance, the will and testamentary trusts as factors in estate planning; consideration of the impact of gift, income, estate and inheritance taxes; powers, duties and problems of the fiduciary. *(Note: This course presupposes that the student either has taken or through practice is familiar with the content of courses in Fiduciary Administration and Estate, Inheritance, and Gift Taxation.)*

JOHN H. LINSLEY, LL.B., Harvard University; *practicing attorney, Boston; former Moderator, Probate and Estate Planning Forum; Probate Committee, Boston Bar Association.*

MONDAYS & WEDNESDAYS, 7:00 TO 7:50 P.M.

Additional information and registration forms may be obtained from the REGISTRAR, Suffolk University Law School, 20 Derne Street, Boston 14, Mass., CA 7-1043.

A PENDING BILL AS TO FORECLOSURE OF MORTGAGES UNDER THE SOLDIERS AND SAILORS CIVIL RELIEF ACT

At a meeting of the Abstract Club on October 20, 1958, twenty-five or thirty active practitioners being present, the following memorandum and draft act to avoid serious delays, under Lynn Institution for Savings v. Taff, 314 Mass. 380, were submitted for discussion and approved. Thereafter the bill was filed and is now pending before the committee on Legal Affairs as House 1172. Comments will be welcomed. F.W.G.

MEMORANDUM

In the QUARTERLY for March 1958, p. 20, it was suggested (after reference to the Hoffman Case, 231 Mass. 324, the Guleserian Case, 331 Mass. 431, and the Lynn Case, 314 Mass. 380) that a separate proceeding limited to the issue of Soldiers and Sailors could be provided leaving others to raise other issues in a separate proceeding under general equity jurisdiction. There seems to be no reason against it. In the Lester Case, 234 Mass. 559, Judge Jenney quoted the Hoffman Case and decided that the Soldiers and Sailors act was "a special circumstance" to give equity jurisdiction. Special procedure for such special jurisdiction is surely appropriate and permissible. Why not?

In support of this memorandum and of the draft act below, we call attention to the limitation of the benefits of the Federal act to "owners" and the recognition by the Court of the purpose of the act not to unduly delay our customary foreclosure proceedings.

"OWNERS"

In Guleserian v. Pilgrim Trust Co., 331 Mass. 431, at pp. 433-34, the Court said (after referring to the U. S. Code [1946 ed.], Title 50, Appendix § 532:

> "We are of opinion, however, that § 532 of the act does not apply to persons such as the assenting creditors under the trust or their assignees, though they may be in the military service. Section 532 (1) reads in part, 'The provisions of this section shall apply only to obligations secured by mortgage . . . upon real or personal property owned by a person in military service. . . .' In this Commonwealth a mortgagee has the legal title to the mortgaged property, subject to defeasance, and in this aspect he is the 'owner,' but for most purposes and according to popular understanding the mortgagor is considered the 'owner' of the mortgaged property. This view of the respective interests of the mortgagor and the mortgagee is inherent in those cases which have arisen under the act. The mortgagee holds the legal title but it is clear that the mortgagor who holds the equity of redemption is the 'owner' for the purposes of § 532. No case has been brought to our attention, and we have found none, which holds the contrary. The beneficial owners of

the second mortgage whether they were assenting creditors or assignees of such creditors cannot fairly be said to be 'owners' of the property within the intendment of the act and would not be entitled to invoke it."

This case seems to limit the opinion in the Hoffman Case as to beneficiaries, but does not quite overrule it. The bar in advising, is still afraid of the possibility of an unrecorded deed.

The Purpose of State Procedure

In State Realty Co. v. McNeil Bros. Co., 334 Mass. 294, at pp. 298-99 the Court said:

"These statutes were passed in aid of the Federal Soldiers' and Sailors' Civil Relief Act, U. S. C. (1952 ed.), Title 50, Appendix § 532. The subject matter of State Realty's suit was merely the obtaining of a court order required by the Federal law before resort could safely be had to the means of foreclosure by entry and sale under power commonly employed for generations in foreclosing mortgages in this Commonwealth. It was not the purpose of the State statutes or of the Federal statute or of Rule 32 to require the bringing of a plenary suit such as is regularly employed in many states for the foreclosure of mortgages, a method seldom employed here. Morse v. Stober, 233 Mass. 223, 226. John Hancock Mutual Life Ins. Co. v. Lester, 234 Mass. 559, 563. See Old Colony Trust Co. v. Great White Spirit Co. 178 Mass. 92; Hoffman v. Charlestown Five Cents Savings Bank, 231 Mass. 324, 329. We do not doubt the power and duty of equity courts in this Commonwealth to protect the service-man to the full extent required by Federal law, but we think it was the purpose of the State statutes hereinbefore cited to provide means of furnishing that protection without the abandonment of the simple methods of foreclosure in common operation and the substitution of long drawn out and expensive procedures to which we were not accustomed."

This last sentence states the purpose of H. 1172.

Petition

"The undersigned citizen of Boston respectfully petitions for the passage of the accompanying bill or for legislation to avoid unnecessary delay and expense in procedure to ascertain and protect the interest of persons entitled to the benefits of the 'Soldiers' and Sailors' Civil Relief Act' in a bill in equity for leave to foreclose a mortgage." Frank W. Grinnell

House 1172 (Before Legal Affairs)

An Act Relative to Procedure for the Foreclosure of Mortgages Under the Soldiers' and Sailors' Civil Relief Act.

Section 1, Chapter 57 of the Acts of 1943, as amended by Chapter 120 of the Acts of 1945, is hereby further amended by inserting the following sentences at the end of Section 1:

In proceedings under this section, no person whether named as a defendant in the bill or not who is not entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, with respect to the mortgage, trust deed or other security described

in the bill shall be entitled to appear or be heard in such proceeding except on behalf of a person so entitled and unless an affidavit by the claimant, or a certificate by Counsel appearing for him, that he is in the service and thus entitled to the benefit of the act, is filed with the appearances: such proceedings shall be limited to the issues of the existence of persons so entitled and their rights, if any. Issues other than the existence and rights of persons so entitled shall be raised in other proceedings by persons not so entitled.

Section 2. The form of notice in Section 1 of said Chapter 57 is amended by striking out the words "to all whom it may concern" and substitute the words "to all persons entitled to the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended."

RULES

It would seem that a Superior Court rule for a summary preliminary hearing in this special proceeding in Equity on the primary issue of the known existence, of any person entitled to the benefit of the act will be helpful but no statutory provision seems needed as the Superior Court now makes the Equity rules.

F.W.G.

"LAW DAY," MAY 1st, 1959, AND THE OBSERVANCE OF THE 100th BIRTHDAY OF THE SUPERIOR COURT OF MASSACHUSETTS

The President of the United States has again issued a proclamation dedicating May 1st as "Law Day" for nation-wide observance of American liberty under law. As this year marks the first century of the great trial court of the Commonwealth, May 1st has been selected as most appropriate for the celebration of the court's birthday. Plans are in preparation and will be announced later.

F.W.G.

THE GOVERNOR'S PROPOSAL FOR ANOTHER CONSTITUTIONAL CONVENTION

Extract from His Recent Second Inaugural Address

"The Constitution provides the framework which governs and controls the operation of the State Government. The taxes that we pay, our industrial position in relation to other states, the relationships between local units of government and the State Government, the organization and management of the affairs and functions of the State Government itself, and the qualification of voters are, in large measure, controlled and determined by Constitutional provisions established more than forty years ago.

"I again recommend the calling of a popular Constitutional Convention and that provision be made at the earliest possible time for a referendum of the people. The experience of other states clearly demonstrates the advisability of providing a skilled and competent staff to prepare necessary materials to assist the deliberation of the duly elected delegates.

"It is my belief that among the matters which should be considered at such a Convention are:

"1. The tax policies and tax structure of the Commonwealth, including the adoption of a graduated income tax.

"2. The re-organization of the Executive Branch of the government.

"3. The evaluation of the relationships and functions of local governmental units to the State Government.

"4. The establishment of a four-year term for Constitutional officers.

"5. The advisability of permitting necessary incentives for the growth and expansion of industry.

"6. The reduction of the voting age to eighteen."

Discussion

The calling of another convention is a very grave proposal which should make the bar and the public generally begin to think about it.

It is in no captious or disrespectful spirit that I submit my belief that it is not only inadvisable, but that it involves gravely dangerous possibilities (not, I think, generally realized) of weakening, rather than strengthening the government of the Commonwealth.

I think, as a citizen representing no one, that I should state the reasons and experience on which my judgment is based, for what it is worth, especially as I have been unexpectedly quoted in the press.

I happen to have been intimately connected, not only with the study of our constitutional history before and since the last con-

vention, for more than fifty years, but I sat in the gallery and listened to the debates at almost every session of that convention during the summers of 1917 and 1918 and the short session of 3 or 4 days in August 1919. I write, therefore, from personal observation and discussion and personal participation in controversies and litigation arising from results of that convention. I also compiled, through a news clipping bureau (and read as it appeared) the story of the convention as it appeared in the newspapers throughout the Commonwealth. That collection of news items, editorials and cartoons in 24 large scrapbooks is now on deposit in the Massachusetts Historical Society. They contain a good deal of information which does not appear in any official volumes.

I have suggested that a convention is dangerous for the people. Why? All life is dangerous for each and all of us and government which is simply all of us can make mistakes of judgment similar to those of any of us or any group or majority of us. Why is a constitutional convention particularly dangerous? Because it is gambling with our constitutional foundations on the uncertainties of the election of a large body of men who would supposedly, but not necessarily, be wiser and better informed than our legislators. It is common for speakers or writers to refer to the "able" men in the earlier conventions, and there were some in all of them, but they were not always wise or wiser than some of our legislators. I say this with confidence because I have read of many and listened to others. There were special reasons for each of the earlier conventions. There are special dangers today which were less serious at the time of the earlier conventions when our population was very much smaller and with fewer distractions. We must remember that calling a convention may involve the overhauling of the entire structure of our government since 1780 under which the Commonwealth has grown up. It was not until 1949 that the legislature required the teaching of Massachusetts history in our high schools with the result, discovered during the Massachusetts Heritage Programs since 1954, that there is an appalling lack of knowledge and understanding of the history of our government and its reasons.

What is the bearing of all this on the question of a convention? Let us see. There is a remark of Edmund Burke in 1774 in his famous address to the Electors of Bristol (his constituents):

"Government and legislation are matters of reason and judgment, and not of inclination."

While seldom read or remembered probably today, those words are as true today as when they were spoken, and what do they mean both in theory and practice? They mean, as Grover Cleveland said, that "public office is a public trust" and every state officer and every legislator and every member of a convention is in a fiduciary position. He is a trustee of all his powers, of his own brains and balanced and informed judgment, not merely for the majority which elected him, but also for the minority of voters who opposed him, or did not vote at all, and, especially, for every child in the

Commonwealth and their descendants—in other words "posterity" *or us* for whom the "Founding Fathers" thought and acted. That is also true, in a diluted sense because of numbers, of every voter. That is not theory. It appears expressly in the preambles of the Massachusetts Constitution and of the Federal Constitution and it is the hope of our form of government. As one of our most balanced historians—the late Andrew C. McLaughlin—said, "the hope for successful popular government—and its justification—is based upon the willingness of people to think."

I am not naive enough to suggest that we *do* think as much as John Adams warned us that we should in the 18th article of our Bill of Rights if we wish to preserve our blessings. I merely wish to counteract seemingly cynical and excessively economic views of our history which I have seen in print or noticed in conversation for years, not only among laymen but sometimes lawyers, by pointing out that our Constitution, whatever may be considered imperfections, was, and still is, as the late Charles Warren said, perhaps, the most influential document of its kind and that it is not a cynical document. It developed from the thinking of dedicated men. In an appreciative tribute in celebration of the 90th birthday of Justice Holmes in 1931, Justice Cardozo spoke of the effectiveness of Holmes in combating "the tyranny of tags and tickets" with a reference to page 230 of "Collected Legal Papers" where Holmes said:

"I am struck with the blind initiativeness of man, when I see how a doctrine, a discrimination, even a phrase, will run in a year or two over the whole English speaking world."

Thought in the form of slogans (with which we are all familiar) has its political dangers. It is not the kind of thought contemplated by the 18th article or by Prof. McLaughlin when he wrote:

"You cannot in discussion of American History lose sight of the seventeenth century." He emphasized the fact,

"That the work of the American Revolutionist was not so much to create something brand new, as to take up the old, and to make old visions real, give dreams a body, transmute hopes into tangible institutions." And again,

"One thing appears to be certain: individual liberty, law, limited government, federalism, local and personal responsibility and power —all these cannot continue unless supported by intelligence and by some portion of that earnestness and consecration which established our constitutional principles and enabled America to survive."

Now what happens today with our enormously increased population and the lack of knowledge or education about our history? The Convention of 1917-18 submitted 19 constitutional amendments on the same ballot in 1918. They were all approved by a majority of those who voted *on them* but only by a minority of those who voted *on candidates* at the election. The official figures showing more than 150,000 blanks on all but one may be found in 4 Massachusetts Law Quarterly No. 3, February, 1919, pp. 120-139. The one exception showed 96,648 blanks.

Ever since 1821 our legislators have had, first under the 9th amendment by vote of both Houses, and today under the 48th amendments and by vote of a joint session of both Houses, in two successive legislatures the power to formulate and submit to the people "specific" amendments. That authority in the 9th amendment resulted largely from the wisdom of a few of the wisest, such as Charles Jackson, then a Justice of the Supreme Judicial Court and Chairman of the Committee on amendments in the Convention of 1820 who summarized the debate in one sentence:—

"It was thought by the Committee that it would not be a fair exercise of the powers of the convention and would not be doing justice to their constituents unless every proposition were submitted separately for their adoption or rejection." (Debates of Convention 1820, p. 223)

The Convention of 1853, in spite of its "able" men, ignored that wisdom, and submitted a whole new constitution with some amendments sandwiched in. As stated by the late Arthur Lord (a former president of the Massachusetts Bar Association) in an address on the history of the Constitution and its amendments, that convention "accomplished little except publication of three bulky volumes of debates and proceedings . . . for the new and revised Constitution was rejected entirely by the voters, and none of the seven separate amendments proposed were adopted." A few of them, some years later when submitted separately, were "ratified . . . in the orderly and well guarded way defined in the Ninth Amendment." Mr. Lord's address appears in 2 Mass. Law Quarterly, No. 1, October, 1916.

I have referred to the widespread lack of knowledge of our history discovered during the Massachusetts Heritage Programs. In an attempt to counteract this condition for the future, in 1954 and each year thereafter, His Excellency, The Governor, has issued a Proclamation of "Massachusetts Heritage Month" for programs in the schools. In 1954, the Massachusetts Bar Association, and in 1955, the Commonwealth, in cooperation, issued 50,000 copies of an illustrated pamphlet about our history and the work of the dedicated, informed men who thought out and formulated the substantial structure of our government 178 years ago. Those pamphlets were circulated to high school students, teachers, school superintendents and libraries throughout the Commonwealth. The appreciative responses received from all directions have been illuminating. They may be summarized by the remark of one high school senior to whom the pamphlet was shown in proof in 1954 before its publication. He said, "I have learned more about our history from those twelve pages than I ever learned in school."

Think that over.

Now the gamble is in the question—how many informed careful men would get elected in these distracting days—men, for instance, like a Worcester man who kept his eye on every word of proposed amendments and on, at least, two (and probably more) occasions

saved the people of the commonwealth at the last minute from serious legal troubles. How many of the multitude of voters who really vote, realize the special fundamental nature of the work of a convention as compared with legislation? Nobody knows. It would be a gambling guess but the answer is suggested by the usual 150,000 blank ballots.

In this connection I suggest the reading of Mr. Lord's address on the history of amendments and conventions from 1780 to 1900. The scrapbooks of news clippings which I have mentioned contain much of the political history of the convention of 1917-19 and the opinions and briefs in *Loring* v. *Young*, 239 Mass. 349 and *Sears, et al.* v. *Treasurer*, 327 Mass. 310, contain explanations of the litigation in regard to the meaning and operation in practice of some of the work of that body from 1919 to 1951.

In a recent discussion in the press it was pointed out that 308 proposed changes were submitted to the Convention of 1917-18 as well as a new "rearranged" constitution (which ignored the wise advice of the convention of 1820, as the convention of 1853 did). See 239 Mass. 349. It has been suggested that a convention might be limited to certain subjects by the legislature. That is an uncertain question of law. The only discussion in Massachusetts is in a cautious advisory opinion in 6 Cushing 574. It must be remembered that the constitution does not provide for conventions. A convention is an *extra-constitutional* body for which the legislature can regulate the machinery, but not necessarily the subjects for its consideration. A convention limited to a few subjects would simply be another kind of legislature to sit for perhaps a month or two without the constitutional safe-guard, that we now have, of legislative consideration by two successive legislatures thus giving the people time for deliberation before a proposal is voted on at a state election. That is another serious element of danger—the danger of hurried thought with possible political complications. Constitutional law is a story. A story is clearer if it is kept in chronological order with any specific amendments added without scrambling them and obscuring their history. The consideration of specific constitutional proposals under the 48th amendment is one of the functions for which legislators are elected. Should they vote themselves incompetent to perform that function by shifting it to a convention? From my study of the subject I suggest that our legislature is as competent to perform that function as a convention would be.

Space will not permit more detailed discussion at this time, but am I wrong in suggesting the dangerous risk of weakening the Commonwealth by calling a convention as suggested?

F. W. GRINNELL.

THE PROBLEM OF LEGAL INSANITY REPORT OF THE SPECIAL COMMISSION — DISCUSSION

In 1957 the matter of the definition of insanity as a defense in criminal cases were referred to the Judicial Council with a request for a report which was made in its 33rd report. The members of the Council disagreed as will presently appear. That report was then referred to the Special Commission on Capital Punishment as an additional subject for consideration and that Commission has recently filed its report and we think the complete discussion of this subject by the Commission should be called to the attention of the bench and bar. As there are some important differences between the contents of the two reports we also reprint for convenient study and comparison the Judicial Council's discussion of this very difficult problem of definition on which there has been so much difference of opinion and practice on both sides of the Atlantic since 1843.

The discussion by the Council which was referred to the Special Commission by Resolves, Chapter 65, of 1958 follows.

Discussion of the Definition of Insanity by the 33rd Report of the Judicial Council

MAJORITY REPORT

The purposes of H. 2086 [the bill referred to the Council] were: (1) to revise and codify the law relating to the defense of irresponsibility by reason of insanity in criminal proceedings and the law governing incapacity to stand trial; (2) to improve the provisions for the psychiatric examination of defendants claiming such defenses and the taking of expert testimony on the issues; and (3) to provide for the commitment of persons acquitted by reason of insanity and regulate their possible release.

The bill was based primarily on the tentative draft of a Model Penal Code prepared by the American Law Institute. See A.L.I., MODEL PENAL CODE, Tentative Draft No. 4 (1955), article 4. Developed with the aid of an Advisory Committee of judges, prosecuting and defense attorneys, psychiatrists and penologists, the Institute formulations represent a thoroughly considered effort to develop the law in light of modern psychiatric knowledge, while taking due account of the requirements of justice and of public safety. While the Institute does not advocate reform in any given jurisdiction, its work is designed to assist in reconsideration of the law in any state in which the need and the advantages of change may be considered. It thus serves the present situation in the Commonwealth, which ever since the Briggs law was enacted has been concerned with the efficiency and justice of the penal law in dealing with the irresponsible offender.

In the consideration of this subject, in addition to the report of the American Law Institute, the Council has had before it, among other material, the article of former Solicitor General Sobeloff (now a judge of the 4th circuit court of appeal) delivered at the meeting of the National Conference of Judicial Councils in Washington in 1955 and printed in the ABA Journal for September 1955, two opinions in the case of *Howard* v. *U. S.*, 229 Fed. 2nd 602 and 232 Fed. 2nd 274 in the 5th Circuit, the New Hampshire definition, since 1869, in *State* v. *Pike*, 49 N. H. 399 and *State* v. *Jones*, 50 N. H. 369, the District of Columbia rule, since 1954, in *Durham* v. *U. S.*, 214 Fed. 2nd 862, the extended discussion of the authorities in the 9th Federal circuit in *Sauer* v. *U. S.*, 241 Fed. 2nd 640 and the very recent report of the Canadian Royal Commission, dated October 25, 1957, containing the latest discussions by a majority and minority, of all the various suggestions for defining legal "insanity" on both sides of the Atlantic. The much discussed rules in M'Naghten's case in 1843 (10 CL. and F 200 at p. 209) are reprinted on pages 10-11 of that report.

At the hearing before the Judiciary Committee on H. 2086, a number of minor changes were suggested. These were incorporated in a revised draft submitted to the Committee by the proponents of the original bill. The Draft Act attached to this report embodies these changes. In the following discussion, section references are to this revised Draft Act which follows this explanation of it.

Section 100. The legal definition of insanity is not now stated in this state by statute. The present rule, as formulated by the courts, is as follows:

> "One whose mental condition is such that he cannot distinguish between right and wrong is not responsible for his conduct, and neither is one who has the capacity to discriminate between right and wrong but whose mind is in such a diseased condition that his reason, conscience and judgment are overwhelmed by the disease and render him incapable of resisting and controlling an impulse which leads to the commission of a [crime]." *Commonwealth* v. *McCann*, 325 Mass. 510, 91 N. E. 2d 214 (1950).

This statement of the principle takes due account of the fact that capacity for knowledge and control are the constituents of a responsible action and that it is precisely these capacities that are impaired when mental disease or defect produces irresponsibility.

There is, however, an important difficulty with this formulation which Section 100 is designed to overcome. The difficulty is that it requires on its face *total* impairment of capacity to know or to control. Mental disease, even when it is most extreme, rarely produces such *total* incapacity. Its effect is rather to work significant impairment in these normal human powers, an impairment which may be more or less depending on the gravity of the affliction. Section 100 would permit the examining physician to give evidence as to the extent of the impairment in a given case. This would ease the difficulty now posed to the examining physician when he must

answer categorically whether the defendant did or did not have capacity to know or to control (*cf. Commonwealth* v. *Clark*, 292 Mass. 409, 412 [1935]), without diminishing the power and authority of the tribunal to appraise the bearing of the psychiatric finding on the ultimate issue of the defendant's responsibility. The change would still leave the jury to make the final determination whether the impairment of the defendant's powers had gone so far that "he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." This would probably do no more than make articulate in law the way that Massachusetts juries function now in fact, when the defense of insanity is interposed. [Compare Mr. Muldoon's dissent as to this section, p. 62.]

As an additional safeguard, Section 100 (2) makes clear that repeated criminal or anti-social conduct does not suffice in itself to establish mental disease or defect. There must, in short, be evidence of disease, apart from the criminal conduct to be judged, for the question of responsibility to be in issue.

For these reasons a majority of the Council recommend the draft act below:

DRAFT ACT Submitted by the Majority

Section 100. Mental Disease or Defect excluding Responsibility.—(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (2) The terms "mental disease or defect" as used in sections one hundred to one hundred and one, inclusive, and section thirteen of chapter two hundred and seventy-eight do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. [Compare dissent below on this section.]

JUDGE DONAHUE'S MINORITY REPORT

"Judge Donahue wishes to record his dissent to the foregoing Report, in that he believes that it substitutes for an easily understood definition of criminal insanity one which would be confusing to juries."

MR. MULDOON'S MINORITY REPORT AS TO SECTION 100

The differences of opinion among the members of the Judicial Council relate to the proposed definition in the first sentence of Section 100 of the draft act. That sentence reads,

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct *or to conform his conduct to the requirements of law.*"

We have discussed a number of differently worded definitions.

I am unable to agree in recommending the insertion in our statute law of the words printed above in italics. As stated in the majority report, "the legal definition of insanity is not now stated in this state by statute." It exists in judicial opinions one of the latest of which, *Com.* v. *McCann*, 325 Mass. 510 is quoted among other

cases cited in the opinion back to *Com.* v. *Rogers*, 7 Met. 502—the leading case consisting of an actual charge to a jury by Chief Justice Shaw in a murder case in 1843 about the same time as the much criticized English M'Naghten rules as to knowledge between right and wrong. After the charge the jury found the defendant "not guilty" (see p. 506).

As I read the charge of Chief Justice Shaw and other Massachusetts cases, I do not think the strict M'Naghten rules have ever been the law of Massachusetts, but I think the law as commonly understood may need clarifying along lines suggested in the majority report as to knowledge and control and the capacity for the criminal intent. My difficulty with the words in italics above quoted in Section 100, is their vagueness as a guide for a judge in decision or instructions to a jury. I am supported in my objection by the views of a number of lawyers familiar with criminal practice to whom I have shown Section 100 and I find additional and impressive support in the latest discussion of the Canadian Commission presided over by the Chief Justice of the High Court of Ontario which appeared on October 25, 1957. That Commission appointed in 1954, after almost three years of consideration discusses not only the conflicts of opinion in the United States, but the New Hampshire law and that of the District of Columbia in the Durham case and, specifically, the exact wording of Section 100, which originated in the discussions of the American Law Institute to which the report refers. The majority of the Commission concludes (pp. 32-33),

> "We think the main proposal [that in Section 100] has many features of our law as presently interpreted and applied, but has the defect of having no jurisprudence to support it *and would be much more difficult to present to a jury.*"

I agree with that comment. It seems to me that the words "or to conform his conduct to the requirements of law" would confuse rather than clarify the law of Massachusetts as now existing under the Massachusetts decisions and for that reason should not be used.

As an alternative to Section 100, I suggest that adoption of the Canadian definition set forth in said Report on Page 8, namely:

> "(1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
>
> (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
>
> (3) *A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state

* As to this Subsection 3, the Commission suggests "but not without some hesitation, that in view of modern psychiatric knowledge the subsection can well be dropped from the law, and that any legitimate defense that could be raised under that subsection can be raised under subsection (2)," see Report, p. 36.

of things that, if it existed, would have justified or excused his act or omission.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane."

may be the answer sought.

This definition, with slight modification, has stood the test of judicial administration since 1893 in Canada.

It should be said that Canada has an Act called the Interpretation Act, RCS. 1952, Chapter 158, Section 15.

"Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing that Parliament deems to be for the public good, or to prevent or punish the doing of any thing that it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision of enactment, according to its true intent, meaning and spirit."

Incorporation into the statute under consideration of language like the Interpretation Act might also be of assistance in reaching the solution of this very difficult problem, as it is done in Canada.

I do not mean a general act like that quoted but a sentence (not uncommon in statutes) something like this:

"This act shall be deemed remedial and shall accordingly receive such fair and reasonably liberal construction and interpretation as will best insure the attainment of justice which it is intended to promote."

AN ALTERNATIVE SUGGESTION

If the foregoing suggestions are not considered advisable by the legislature, I suggest, as an alternative, that no attempt at statutory definition be made, that Section 100, as a statutory definition be omitted as not necessary for the operation of the rest of the draft act dealing with administrative matters, submitted by the Council. This would leave the legal test of "insanity" to develop under our judicial decisions as the local law of Massachusetts.

The Supreme Court of the United States in *Fisher* v. *U. S.*, 328, U. S. 463 treated the question as one of the local laws of the District of Columbia. No matter what words are used sooner or later their meaning will have to be determined by the court as a matter of the local law.

FREDERIC J. MULDOON

Judge Fenton and Judge Leggat agree with the alternative suggestion to omit Section 100 and leave definition to our judicial decisions.

These discussions being referred to the Special Commission as already stated, that commission reported as follows:

REPORT OF THE SPECIAL COMMISSION ON THE PROBLEM OF LEGAL INSANITY

One of the most difficult ancillary issues with which the Special Commission on the Abolition of the Death Penalty has had to deal is the question of the adequacy of existing Massachusetts law in fairly and effectively determining whether or not a person accused of first degree murder was mentally responsible for his crime. The law in Massachusetts with respect to mental irresponsibility in capital cases, and its effects, cannot properly be understood without some consideration of the historical background which directly underlies Massachusetts law in this highly important and increasingly controversial area.

In 1843, Daniel M'Naghten labored under the overpowering delusion that certain prominent people, including the leader of the Tory Party in England, Sir Robert Peel, were engaged in an organized conspiracy against him. Acting on the basis of this delusion, M'Naghten felt impelled to secure a pistol and station himself in a position of readiness to thwart the plans of this conspiracy by killing Peel. Never having seen Peel, and not having the vaguest notion of what he looked like, M'Naghten shot and killed the unfortunate Edward Drummond, Peel's Secretary, by mistake.

When the case went to trial, eight medical witnesses testified that M'Naghten had no control over his action since he was laboring under an overwhelming delusion. Lord Chief Justice Tindal ultimately stopped the case and ordered the jury to bring in a directed verdict of "not guilty by reason of insanity."

The M'Naghten case provoked great controversy and discussion in England. As a result, the House of Lords drew up a questionnaire which was circulated among the fifteen High Court Judges of England. The answers of fourteen of the fifteen High Court Judges in this extraordinary and unprecedented action have come to constitute the so-called M'Naghten Rules regarding the criminal responsibility of persons suffering from insane delusions.

In the light of Anglo-Saxon jurisprudence, with its emphasis upon the system of stare decisis, it is important to remember historically that the M'Naghten Rules originated as a purely advisory opinion of the High Court Judges of England. Yet, in spite of its hesitant historical origin in law, this advisory opinion has carried, and still carries, enormous legal weight; probably more weight than any actual decision on any case in the entire history of Anglo-Saxon law. Since it was first ennunciated one hundred and fifteen years ago, it has constituted, with slight modifications here or there, and with the exception of few jurisdictions, the fundamental and accepted formula for the juridical determination of mental irresponsibility in the English speaking world.

The most significant passage in the Judges' answers in the M'Naghten case was the following:

"... the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."

The M'Naghten Rules postulated a knowledge of right and wrong as the determinative test of criminal responsibility. In so doing, they compartmentalized the functions of the human mind. They concentrated exclusively upon cognition and completely ignored other aspects of the workings of the human mind, such as volition and emotion. They did not concede any role in the motivation of human behavior to the operation of unconscious mental forces.

In 1844, Chief Justice Shaw, in the case of *Commonwealth* v. *Rogers* (7 Metcalfe 500) specifically adopted the M'Naghten Rules as the basis of determining criminal responsibility for murder in Massachusetts. Chief Justice Shaw, in part, said:

"In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.

On the contrary, although he may be labouring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts."

But the decision of Chief Justice Shaw went appreciably beyond the right and wrong test of the M'Naghten Rules. Chief Justice Shaw clearly and explicitly recognized the existence of a range of criminal behavior in which the individual, while knowing the difference between right and wrong, might be so overcome by an irresistible, uncontrollable impulse that he might properly be deemed mentally irresponsible. Thus, Massachusetts has never applied the M'Naghten Rules per se, but has always modified the M'Naghten Rules by additional reliance upon the so-called irresistible impulse test. Chief Justice Shaw made this important modification in *Commonwealth* v. *Rogers* when he went on to say:

"If then it is proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will

be whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it."

That the M'Naghten Rules, as modified by the irresistible impulse test, is the law in Massachusetts has been reaffirmed in numerous cases since *Commonwealth* v. *Rogers*. See, for example, *Commonwealth* v. *Johnson*, 188 Mass. 382, 388; *Commonwealth* v. *Cooper*, 219 Mass. 1, 4-5; *Commonwealth* v. *Stewart*, 255 Mass. 9, 13; *Commonwealth* v. *Trippi*, 268 Mass. 227, 230; *Commonwealth* v. *Shepard*, 313 Mass. 590, 594. One of the most recent formulations of the rule in Massachusetts is contained in *Commonwealth* v. *McCann*, 325 Mass. 510, where the Court said:

"One whose mental condition is such that he cannot distinguish between right and wrong is not responsible for his conduct, and neither is one who has the capacity to discriminate between right and wrong but whose mind is in such a diseased condition that his reason, conscience, and judgment are overwhelmed by the disease and render him incapable of resisting and controlling an impulse which leads to the commission of a (crime)".

Ever since the M'Naghten Rules were first promulgated, they have been a target of constant criticism. Even in 1843, a majority of the medical profession, and the most enlightened members of the legal profession, recognized the obsolete, archaic nature of the formulation as it related to the actual conduct and functioning of the human mind. As early as 1838, Issac Ray, one of the founders of the American Psychiatric Association, in publishing his pioneer tract, *Medical Jurisprudence of Insanity*, vigorously attacked the use of knowledge of right and wrong as a test of criminal responsibility. He pointed out:

"That the insane mind is not entirely deprived of this power of moral discernment, but in many subjects is perfectly rational, and displays the exercise of a sound and well balanced mind is one of those facts now so well established that to question it would only betray the height of ignorance and presumption."

In 1864, the Medical Officers of Hospitals and Asylums for the Insane in England adopted the following resolution at a meeting:

"That so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently among those who are undoubtedly insane and is often associated with dangerous and uncontrollable delusions."

The M'Naghten Rules conspicuously failed even in 1843 to codify the knowledge of the operation of the human mind then available. Nevertheless, this classic formulation has, as we have seen, per-

sisted with a remarkable tenacity through the years. The science of psychiatry, a word not even known in 1843, has advanced enormously since the fourteen High Court Judges set down their thoughts on the subject of mental irresponsibility for criminal behavior. Yet the law, ponderous and slow-moving in this field, has largely failed to keep pace with modern scientific developments in psychiatry.

Modern psychiatry recognizes that man is an integrated personality; that reason constitutes but one element in that personality; and that reason is neither the sole, nor necessarily the most important determinant of human behavior. In his classic study, Psychiatry and the Criminal Law, Professor Sheldon Glueck in 1928, pointed up the anachronistic character of the M'Naghten Rules in the light of modern psychiatric knowledge. Professor Glueck said:

> "It is evident that the knowledge tests (The M'Naghten Rules) unscientifically abstract out of the mental make-up but one phase or element of mental life, the cognitive, which in this era of dynamic psychology, is beginning to be regarded as not the most important factor in conduct and its disorders. In brief, these tests proceed upon the following questionable assumptions of an outworn era in psychiatry: (1) that lack of knowledge of the nature or quality of an act (assuming the meaning of such terms to be clear), or incapacity to know right from wrong, is the sole or even the most important symptom of mental disorder; (2) that such knowledge is the sole instigator and guide of conduct, or at least the most important element therein, and consequently should be the sole criterion of responsibility when insanity is involved; and (3) that the capacity of knowing right from wrong can be completely intact and functioning perfectly even though a defendant is otherwise demonstrably of disordered mind."

It would readily be possible to compile a lengthy list of medico-legal writers over the years who have on occasion leveled an attack upon the M'Naghten Rules. Among the most eminent and qualified of the recent critics is Justice Felix Frankfurter of the United States Supreme Court who, in testifying before the British Royal Commission on Capital Punishment in July, 1950 declared:

> " . . . The M'Naghten Rules were rules which the Judges, in response to questions by the House of Lords, formulated in the light of the then existing psychological knowledge. . . . I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated. . . . If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us—they are honored in the breach and not in the observance—then I think the law serves its best interests by trying to be more honest about it. . . . I think that to have rules which cannot rationally be justified except by a process of interpretation which distorts and often practically nullifies them, and to say the corrective process comes by having the Governor of a State charged with the responsibility of deciding when the consequences of the rule should not be enforced, is not a desirable system. . . . I am a great believer in being as candid as possible about my institutions. They are in large measure aban-

doned in practice, and therefore I think that the M'Naghten Rules are in large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say, 'We'll just juggle them'. . . . I dare to believe that we ought not to rest content with the difficulty of finding an improvement in the M'Naghten Rules. . . ."

In short, the collective import of the views of critics of the M'Naghten Rules was once succintly and appropriately summarized by Mr. Justice Cardozo when he observed:

"Everyone concedes that the present (legal) definition of insanity has little relation to the truths of mental life."

Our studies and consideration of the situation governing the determination of mental irresponsibility for first degree murder in Massachusetts leads us to the inescapable conclusion that our present law is hopelessly archaic and badly in need of revision in the light of modern psychiatric knowledge. We firmly believe, however, that any such revision must meet three major requirements:

1. It must bring the law into working harmony with modern medical science, thus enabling the psychiatrist to make his maximum contribution as an expert witness in court unhampered by the necessity for conforming his testimony in a Procrustean manner to arbitrary legal and moral categories which have no special relevance to him within the narrow field of his professional competence.
2. It must be clearly stated in such a way as to be readily applicable and easily understood by a jury of laymen.
3. It must narrowly circumscribe the general range of mental conduct and criminal behavior which shall legally be regarded as irresponsible without in the least way vitiating, even by implication, the moral and legal responsibility of the sane individual for his conduct and actions.

There can be no doubt but that the psychiatric unsoundness of the present Massachusetts law on legal responsibility for criminal behavior has imposed an almost impossible task upon psychiatrists testifying in court. They are called upon to testify in terms of a completely erroneous conception of mental responsibility; a conception which is totally unscientific and inconsistent with the understanding and interpretation of human behavior derived from modern psychiatric experience and research. When they are called upon to answer categorically whether or not the defendant had the capacity to know or to control, as they are required to do under present law (*See Commonwealth* v. *Clark*, 292 Mass. 409), they are called upon to render a moral, not a scientific judgment. They are, thus, effectively precluded from offering the very testimony which presumably has brought them into court in the first place: the relevant scientific facts which medically determine the existence or absence of mental disorders or deficiencies in the defendant which the jury ought to consider in determining as a question of fact the legal responsibility of the defendant.

At the same time it should not be forgotten that the moral, legal, and political tradition of the West rests squarely upon the ethical postulates of individual responsibility and free will. Our system of criminal law is rooted in the firm assumption that man is a rational, social animal; that he is free to commit, or not to commit, acts which violate the law; and that when, by an exercise of his own free will, and with evil intent (mens rea), he chooses to violate the law, he shall be held criminally responsible for his illegal acts to society as a whole. To abrogate or weaken these far-reaching ethical postulates is to court disaster by inviting moral, legal, and political chaos in our society.

Yet, we make a mockery of our heritage if we fail to recognize that where human actions stem from, or are the product of, mental aberrations, responsibility and blame should not attach. We specifically reject the view that all criminal behavior, and particularly murder, can be attributed to mental disease or deficiency, and that, consequently, no personal responsibility should ever attach. We do explicitly recognize, however, that there are a great many cases of criminal behavior which are the direct product or result of mental disease or deficiency and which ought to be regarded as absolving, or at least mitigating, the moral and legal responsibility of an individual defendant for his criminal anti-social behavior.

In the light of the three major requirements discussed above, we have examined with great care the various alternative formulations which have been proposed to lay to rest once and for all the irrepressible Ghost of M'Naghten. We have studied the Durham Rule, established in the District of Columbia in 1954, which in essence provides that the accused is not responsible if his unlawful act was the product of mental disease or defect. We have considered the Scottish doctrine of diminished responsibility. This doctrine enables a jury to reduce the crime from murder to culpable homicide if it is satisfied that a person charged with murder, though not insane, suffered from mental weakness or abnormality to such an extent that his responsibility was substantially diminished. We have examined the rule adopted by the United States Army in its court-martial proceedings; the rule which holds that a person is not mentally responsible unless he was so free from mental derangement as to be able, concerning the particular act charged, both to distinguish right from wrong and to adhere to the right. We have also considered the formulation of the American Law Institute which in May, 1955, proposed that:

> "A person is not responsible for his criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law is so substantially impaired that he cannot justly be held responsible."

While all of these formulations constitute marked progress in liberating the law from the stultifying rigidity of the M'Naghten Rules, we have not been persuaded that any of them at the present

time meets all of the three requirements which we have set forth above. We are very much concerned that in our understandable desire to correct the inadequacy of the existing rules in Massachusetts, we do not go so far in substituting new rules that we open a Pandora's box of unforeseen moral, legal, and scientific difficulties. We recognize the fact that psychiatry has made great progress since 1843, and that our law should reflect these scientific advances. *We firmly believe, however, that modern psychiatry is far from an exact science and that much remains to be achieved in psychiatry before human motivation and behavior is thoroughly understood.* We are unwilling, therefore, to accept any of the proposed alternative formulations discussed above because we believe that the net effect of all of them, to a greater or lesser degree, *is to eliminate completely a clear-cut legal standard, however erroneous, and substitute in its stead, blind, absolute reliance upon the as yet insufficiently developed and imprecise science of psychiatry.*

In our investigation of this problem, we have been greatly impressed by an alternative formulation (minority recommendation) which was set forth in the British Royal Commission Report. We believe that this proposal adequately broadens the narrow range of mental behavior which may now be regarded as irresponsible within the framework of the M'Naghten Rules. At the same time it does not so abrogate those rules as to impose upon modern psychiatry a responsibility which it is presently unqualified to assume.

Recommendations of the Commission With Reference to Legal Insanity

We, therefore, recommend that the following formulation be adopted as the standard for determining mental irresponsibility for criminal behavior in Massachusetts:

> "The jury must be satisfied beyond a reasonable doubt that at the time of committing the act the accused, as a result of disease of the mind or mental deficiency (a) did not know the nature or quality of his act, or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it."

and we respectfully append, hereto, a draft of a proposed act to that effect.

It should be pointed out that the words "disease of the mind" in our proposed formulation are used in the sense of a mental condition which is not static, but which is considered capable of improving or deteriorating over time. By "mental deficiency," however, we mean an arrested or rigidified subnormal mental condition which is essentially unchanging, which is not considered capable of improving or deteriorating, and which may be congenital, or the result of injury, or the residual effect of a physical or mental disease or illness. The term "disease of the mind" and/or "mental deficiency" does not include an abnormality which is manifested only by repeated criminal or otherwise anti-social acts.

In offering this proposal for a revision of the existing law in Massachusetts, we are not unmindful of the wise words of the Massachusetts Supreme Court when, on June 10, 1958, in the case of *Commonwealth* v. *Chester*, the Court said:

> "We do not labor under the illusion that the rule of *Commonwealth* v. *Rogers* is entirely satisfactory. Indeed, in this troublesome field, there will be serious difficulties in any rule that is formulated."

We do believe, however, for the reasons that we have stated, that the adoption of our proposed formulation would go a long way towards giving Massachusetts a workable, realistic, and eminently just definitional standard for determining mental irresponsibility.

Respectfully submitted,

REP. CHARLES W. CAPRARO, *Chairman*
REP. LLOYD E. CONN, *Clerk*
SEN. HAROLD R. LUNDGREN
SEN. MARY L. FONSECA
SEN. EDWARD J. DESAULNIER, JR.
REP. JOHN R. SENNOTT, JR.
REP. ALEXANDER J. CELLA
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REV. DANA GREELEY
DR. OLIVE COOPER

SUGGESTIONS FOR CONSIDERATION

The majority of the Judicial Council in their 33rd report (above quoted) recommended the following definition:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease *or defect he lacks substantial capacity* either *to appreciate* the criminality of his conduct *or to conform his conduct to the requirements of law.*"

This is the clause proposed by the American Law Institute for its Model Penal Code. The last clause divided the council and was rejected by the Canadian Commission. The Special Commission recommends that

> "The jury must be satisfied beyond a reasonable doubt that at the time of committing the act the accused, as a result of disease of the mind or mental deficiency (a) did not *know* the nature or quality of his act *or* (b) did not *know* that it was wrong *or* (c) was incapable of preventing himself from committing it."

The opening words seem to put a heavier burden of proof on the defendant than either the M'Naghten Rules or the Massachusetts law as stated in *Com.* v. *Rogers* (see 7 Met. at p. 506).

In the Judicial Council report reference was made to the report of the Canadian Commission "containing the latest discussions, by a majority and a minority, of all the various suggestions for defining

legal 'insanity' *on both sides of the Atlantic.*" The Commission consisted of Hon. J. C. McRuer, Chief Justice of the High Court of Ontario, Chairman; Dr. Desrochers, Assistant Medical Superintendent of a Quebec Hospital, Vice Chairman; Judge Helen Kinnear of the Haldimand County Court; Professor of Psychiatry Robert O. Jones, of Dalhousie University; and Joseph Harris, President of Great-West Life Assurance Co. and vice president of the Canadian Bank of Commerce. The Commission was appointed in 1954 and after two or more years of study (fully described) filed its report which seems to be the most complete report by the majority and the minority (Judge Kinnear and Prof. Harris) that we have seen. After quoting in full the M'Naghten Rules (constantly referred to in all discussions but seldom quoted) the commission said:

> "A careful examination of the applicable provisions of the Canadian Statutes and the M'Naghten Rules demonstrates that there is a difference between the legislation in Canada and the English jurisprudence which goes to the very root of the determination of criminal responsibility. The phrase used in Canada is "incapable of *appreciating* the nature and quality of the act" (since April 1, 1955, "appreciating the nature and quality of *an* act"). *That is not synonymous with knowing the nature and quality of a physical act.*"

The difference is discussed at some length. Mr. Muldoon, in his Minority Report, quoted a Canadian Statute as to interpretation which is important and suggested an abbreviated adaptation of it to any definition of insanity. Mr. Muldoon also calls attention to the case of *Fisher* v. *U. S.*, 328 U. S. 463, in which the court treated the question as one of the *local* laws of the District of Columbia. He then suggests that "no matter what words are used sooner or later their meaning will have to be determined by the court [of Massachusetts] *as a matter of local law.*" So he suggested, "as an alternative" to statutory definition, "that no attempt at statutory definition be made" but that the legal test of "insanity" be left to develop under our judicial decisions in the light of all the varying opinions and discussions and growth of scientific knowledge since Chief Justice Shaw's charge to the jury in 1844.

In this connection in addition to the paragraph from Chief Justice Shaw's charge quoted by the Special Commission, the whole charge should be read and reread. It was delivered on behalf of three out of the four justices, as murder cases were then tried before three Supreme Court justices. When so read, we think it may be found to be more capable of adjustment to advances in scientific knowledge than any statutory definition that we have yet seen when it is remembered that whatever words are used the jury will be the ultimate judges of facts to which the words are to be applied; all the discussions are about what words will help a jury. In the address of Judge Soboloff, while Solicitor General (See A.B.A. Journal for September, 1955), mentioned in the Judicial Council report and also in the Canadian report (p. 61), he said, under the title "From M'Naghten to Durham and Beyond,"

"What we ought to fear above all is not the absence of a definition, 'but being saddled with a false definition.' "

Returning to *Com.* v. *Cushing*, the opening words of Chief Justice Shaw were "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose." (See p. 501.) On p. 504 "In general, it is the opinion of the jury which is to govern, and this is to be formed upon the proof of facts laid before them" and, on p. 505, expert opinion "is designed to aid the judgment of the jury, in regard to the influence of certain facts." Finally one should read on p. 506, the result of his five-page charge. The jury after being out for "several hours" asked "must the jury be satisfied, beyond a doubt, of the insanity of the prisoner, to entitle him to an acquittal?" He answered "if the *preponderance* of the evidence was in favor of insanity—the jury would be authorized to find him insane," and they did. In the light of this last instruction the words "beyond a reasonable doubt" in the first line of the Special Commission's draft should be stricken out. The government must prove its case including sanity "beyond a reasonable doubt" but "preponderance of the evidence" is enough for the defence. The Canadian word "appreciate" seems broader and better than the word "know." As to the rest of the draft we are not sure that it is not within the scope of Chief Justice Shaw's charge when read carefully *as a whole* including the admissibility of *competent* scientific expert testimony as to reasonably established advanced knowledge since 1844. In view of the variety of definitions by courts or statutes, since all the words are to help the jury, are those suggested better than trusting the common sense of the judge in explaining the law and the common sense of the jury in weighing the evidence, including appearance and testimony of experts, finding the facts and applying the laws to the facts as they see them. In other words—how would Shaw—one of the wisest judges in our history—charge a jury today in the light of modern knowledge? Would he use exactly the same five pages of words as he did in 1844, or would he explain the first paragraph of his charge (p. 501) in the light of his recognition of the difference between some experts and others on p. 505. Have the Special Commission and, perhaps, the courts interpreted Shaw's charge too narrowly and would he not in his own words, explain the law substantially as the Special Commission's draft proposes (except as to "reasonable doubt") without any statutory definition? Perhaps, this approach may be worth consideration instead of what appears to us overstatement of the extent to which the M'Naghten Rules represent the law of Massachusetts.* For an additional convenient reference see the varied tentative conclusions of the English Commission report referred to by the Special Commission. We are inclined to think that Mr. Muldoon and Judges Fenton and Leggat may be right in suggesting that definition be left to our courts, but we invite further comment.

F. W. G.

* *Com.* v. *Cox*, 327 Mass. 609.

NOTICE OF TRAFFIC COURT CONFERENCE ON FEBRUARY 9, 10, 11

The administrative committee of the District Courts of Massachusetts has given its endorsement to the Traffic Court Conference to be held Feb. 9, 10 and 11 at Boston College Law School and suggests that as many judges as are able should attend.

The committee's endorsement was given to the Rev. Robert F. Drinan, S.J., dean of the Law School, by Judge Kenneth L. Nash of Quincy, chairman of the administrative committee.

Other judges on the committee are: Judge Frank L. Riley, Central District Court of Worcester; Judge Ernest E. Hobson, Eastern Hampden District Court, Palmer; Judge Arthur L. Eno, Lowell District Court; and Judge Daniel W. Casey, District Court of West Roxbury.

Judge Nash will be a member of a panel that will discuss the question of whether penalties imposed on traffic law violators in Massachusetts are too light. Specifically, the question to be discussed by the panel will be:

"Are penalties too light in Massachusetts in cases of drunken driving; and, also, driving so as to endanger in fatal automobile cases?" [This matter is discussed in the Judicial Council report.]

Another panel will discuss the question, "Should Massachusetts Have a Uniform (NO-Fix) Traffic Ticket System?" and a third panel will discuss the question, "How Can Massachusetts Provide More Citizen Support for Traffic Safety?"

The conference, a first for Massachusetts, is being sponsored by *The Boston Herald* and the Greater Boston Chamber of Commerce. Wendell H. Coltin, writer of The Herald Safety Crusade series, is the executive director. Judges, police chiefs, prosecutors, Registry of Motor Vehicles officials and others are invited to attend. Inquiries may be made of Fr. Drinan at the Boston College Law School.

BOOK REVIEW

WILLISTON ON CONTRACTS, Third Edition, By Walter H. E. Jaeger, Professor of Law, Georgetown University. Baker, Voorhis & Co., Inc.

Twenty years have passed since the last revision of Williston's treatise on the law of contracts, and it seems highly appropriate that Professor Jaeger, a recognized authority in the practice and teaching of contract law, should undertake to adapt this famous legal tool to the contemporary scene.

The first of the 12 volume revision has already been published and from an examination of the footnotes, it is obvious that Dr. Jaeger and his staff have taken great pains to include references to

case law, significant law journal articles, the Restatement of Contracts, and sundry statutes and uniform laws. A large number of Massachusetts citations are included which makes this revision a particularly useful tool for Massachusetts lawyers.

The frequent use of pertinent quotations and excerpts from recent cases in the footnotes make this work a much more "useable" source of reference for the active practitioner. Many commentaries on the law contain large numbers of citations to the text but the reader is obliged to wade through endless cases in hopes of finding something in point. Dr. Jaeger has made a distinct effort to avoid this sort of legal maze and the results are commendable.

We are advised that the completed work will have a complete revision of the index in order to provide more rapid access to the desired topics.

We are particularly impressed by the fact that the new revision takes into consideration the recent developments in various phases of contract law. The inclusion of references to recent cases and materials, together with the citation of land-mark decisions, makes it very apparent that Dr. Jaeger's new revision is a successful effort to set forth the dynamic growth of the law of contracts in such fashion as to earn this third edition of Williston a place in the working library of every lawyer and judge who requires sound and basic reference material.

J. B. MULDOON.

AN APPRECIATION OF THE MASSACHUSETTS HERITAGE PROGRAM

January 21, 1959

Mr. Raymond F. Barrett, Esquire
15 Pemberton Square
Boston, Massachusetts

Dear Mr. Barrett:

I am writing to you in your capacity as president of the Massachusetts Bar Association to express my profound appreciation for the quality of the Massachusetts Heritage assembly program which Attorney Andrew R. Linscott of Lynn presented at the Gloucester High School on Wednesday, December 10.

Frankly, we have not participated in this assembly in previous years because I had been concerned with the ability of the average lawyer, whose occupation does not bring him together on any appreciable number of occasions with large groups of high school age youngsters, to present this program in an attractive way to high school youngsters. High school people are a highly critical and easily influenced group, at least superficially; and there is nothing worse than opening a day with an assembly program involving the

attendance of fourteen or fifteen hundred students if the program is hurriedly prepared and given with a pedestrian touch.

This year I decided that the importance of the offering was sufficient to gamble on the presentation, contacted Mr. Linscott, and he agreed to offer the assembly program himself. He did an outstanding job. He could have held the attention of our student body for a full hour. They were extremely interested in all that he had to say and, because of his clever use of illustrative material, were able to understand the points that he made and appreciate the manner in which he made them.

You must realize that any discussion of judicial concepts is essentially abstract, and abstractions are difficult to make clear to a heterogeneous audience which ranges in age from thirteen to nineteen, and in intellectual capacity from quite high to quite low. Mr. Linscott overcame both of these handicaps to the point where he was very successful in a most difficult thing; that is, eliciting questions on his material from the student body at the conclusion of his formal presentation.

My experience with the Massachusetts Heritage program this past December has sold me on it as a means of bringing authoritatively to our young people areas of their citizenship responsibilities which they must know, understand, and appreciate; and if the quality of the presentation which Mr. Linscott offered here in this school can be guaranteed, I feel sure that every school in the state can benefit from this fine gesture on the part of the Massachusetts Bar Association.

Sincerely,

ARTHUR N. SMITH, *Principal*

PUBLIC ADMINISTRATORS APPOINTED IN 1959 SINCE THE APPEARANCE OF THE "LAWYER'S DIARY"

Norfolk County

LEON STEINBERG (Brookline)
JOSEPH H. CORDELLA (Milton)

Middlesex County

WILLIAM J. KITTRIDGE (Hudson)
VICTOR H. GALVANI (Framingham)

Plymouth County

HENRY C. GILL (Brockton)

Essex County

ROBERT J. WEBBER (Lynn)
SHIRLEY LUPINSKI (Lynn)

Public Document No. 144

THIRTY-FOURTH REPORT

Judicial Council of Massachusetts for 1958

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The Commonwealth of Massachusetts

DECEMBER, 1958

TO HIS EXCELLENCY, FOSTER FURCOLO
Governor of Massachusetts

In accordance with the provisions of section 34B of chapter 221 of the General Laws (Ter. Ed.) we have the honor to transmit the thirty-fourth annual report of the Judicial Council for the year 1958.

FREDERIC J. MULDOON, *Chairman,*
STANLEY E. QUA,
REUBEN L. LURIE,
JOHN E. FENTON,
JOHN C. LEGGAT,
ELIJAH ADLOW,
KENNETH L. NASH,
CHARLES W. BARTLETT,
LIVINGSTON HALL.

ACTS OF 1924, CHAPTER 244

As Amended by St. 1927, c. 923, St. 1930, c. 142, and St. 1947, c. 610
Now Appearing as G. L. (Ter. Ed.) Ch. 221, §§ 34A-34C

AN ACT PROVIDING FOR THE ESTABLISHMENT OF A JUDICIAL COUNCIL TO MAKE A CONTINUOUS STUDY OF THE ORGANIZATION, PROCEDURE AND PRACTICE OF THE COURTS.

Be it enacted, etc., as follows:

Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section thirty-four, under the heading "Judicial Council," the following three new sections—*Section 34A.* There shall be a Judicial Council for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts. Said council shall be composed of the chief justice of the supreme judicial court or some other justice or former justice of that court appointed from time to time by him; the chief justice of the superior court or some other justice or former justice of that court appointed from time to time by him; the judge of the land court or some other judge or former judge of that court appointed from time to time by him; the chief justice of the municipal court of the city of Boston or some other justice or former justice of that court appointed from time to time by him; one judge of a probate court in the commonwealth and one justice of a district court in the commonwealth and not more than four members of the bar all to be appointed by the governor, with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding four years, as he shall determine.

Section 34B. The Judicial Council shall report annually on or before December first to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable.

Section 34C. No member of said council, except as hereinafter provided, shall receive any compensation for his services, but said council and the several members thereof shall be allowed from the state treasury out of any appropriation made for the purpose such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. The secretary of said council, whether or not a member thereof, shall receive from the commonwealth a salary of five thousand dollars.

MEMBERS OF THE COUNCIL

FREDERIC J. MULDOON of Westwood, *Chairman*

STANLEY E. QUA of Lowell
REUBEN L. LURIE of Brookline
JOHN E. FENTON of Lawrence
JOHN C. LEGGAT of Lowell
ELIJAH ADLOW of Boston
KENNETH L. NASH of Weymou h
CHARLES W. BARTLETT of Dedham
LIVINGSTON HALL of Concord

FRANK W. GRINNELL, *Secretary*, 60 State St., Boston

THIRTY-FOURTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS

To His Excellency

FOSTER FURCOLO,

Governor of Massachusetts

The Judicial Council was created by St. 1924, Chapter 244 (*See copy printed on opposite page*), "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the Commonwealth, the work accomplished and the results produced by that system and its various parts."

In 1925, the legislature also submitted the following request to the council.

1925 RESOLVES, CHAPTER 27

"Resolved, That the judicial council is hereby requested to investigate ways and means for expediting the trial of cases and relieving congestion in the dockets of the Superior Court, and, among other things . . . measures for discouraging frivolous appeals; measures for requiring parties to frame issues in advance of trial by greater specification in the declaration of what the plaintiff in good faith claims and greater specification in the answer of what the defendant admits or in good faith denies, with suitable penalties for frivolous or unfounded allegations and denials; ways and means for encouraging, so far as consistent with constitutional rights, trials without jury . . . and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. (Approved April 24, 1925.)"

CHANGES IN THE COUNCIL

Since the last report Hon. Frank J. Donahue retired after twenty years of service as a member and Chairman of the Council. Hon. Reuben L. Lurie, Associate Justice of the Superior Court, was appointed by Chief Justice Reardon to succeed him as a member of the Council. Mr. Frederic J. Muldoon was chosen as Chairman by the Council. Hon. Edward O. Gourdin resigned from the Council on his appointment as an Associate Justice of the Superior Court. Mr. Charles W. Bartlett of Dedham was reappointed by Your Excellency for a four year term.

RECOMMENDATIONS ADOPTED IN 1958

During the last session the legislature adopted, either verbatim or in substance, the following recommendations of the Council:

(For reasons see 33rd report, pages referred to.)

CHAPTER 223. AN ACT GIVING PROBATE COURTS CONCURRENT JURISDICTION IN EQUITY OF CONTROVERSIES OVER PROPERTY BETWEEN PERSONS WHO HAVE BEEN DIVORCED. (For reasons see pp. 25-27.)

CHAPTER 239. AN ACT RELATIVE TO THE JURISDICTION AND ENFORCEMENT OF SUPPORT ORDERS AND THE TRANSFER OF PROCEEDINGS UNDER THE UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT. (For reasons see pp. 27-28.)

CHAPTER 256. AN ACT RELATIVE TO THE ADMISSIBILITY IN EVIDENCE AGAINST A DEFENDANT IN A CRIMINAL TRIAL OF STATEMENTS MADE BY HIM WHILE UNDERGOING A PSYCHIATRIC EXAMINATION. (For reasons see pp. 54-55.)

CHAPTER 240. AN ACT AS TO ACQUISITION OF LAND FOR A TOWN WAY. (For reasons see pp. 83-84.)

CHAPTER 270. AN ACT REQUIRING THAT THE DATE ON WHICH ANSWERS TO INTERROGATORIES ARE SIGNED BE STATED THEREIN. (For reasons see pp. 33-34.)

CHAPTER 300. AN ACT PROVIDING THAT JUSTICES OF APPELLATE DIVISIONS SHALL SERVE IN APPELLATE DIVISIONS OTHER THAN THEIR OWN WHEN REQUESTED. (For reasons see p. 13.)

CHAPTER 369. AN ACT AUTHORIZING THE TRANSFER OF CERTAIN ACTIONS AT LAW FROM THE SUPERIOR COURT TO A DISTRICT COURT AND REPEALING THE REQUIREMENT THAT ACTIONS OF TORT ARISING OUT OF THE USE OF MOTOR VEHICLES BE COMMENCED IN A DISTRICT COURT. (For reasons see pp. 10-13.)

RECOMMENDATIONS REPORTED FAVORABLY BY A COMMITTEE BUT NOT ENACTED

A bill reported as H. 2817 providing that the failure to register or the improper registration of a motor vehicle shall not be deemed to render the vehicle a nuisance or to render any person a trespasser upon a way. Substituted in House for House 1281 and eng. Mar. 19; rec'd in Senate, Mar. 25; ord. 3d, Mar. 26; recommitted to Judiciary, Mar. 31; report, reference to the next annual session, Senate, Apr. 24; referred to the next annual session, Apr. 28.*

A bill to prohibit the seizure on an execution on a judgment against a city, town, or other political subdivision of the Commonwealth, of property owned in their own right by individual inhabitants of the city, town, or political subdivision of the Commonwealth. (Pages 39-40.) Basis of House 2879 rejected.

A bill to allow a pre-trial oral examination of parties. (Pages 47-50.) Basis of House 2980 referred to next annual session.

RECOMMENDATION NOT REPORTED

A bill relative to land-takings (pages 73-74, for reasons p. 72). This recommendation is renewed in this report, see p. 93.

MATTERS REFERRED TO SPECIAL COMMISSIONS

So much as relates to the defense of insanity in criminal cases—definition of insanity, etc. (pp. 59-69). Referred to Special Commission on Capital Punishment by Resolves, Chapter 65.

Discussion of the doctrine of *res ipsa loquitur* in connection with actions for damages caused by blasting or the keeping of explosives

* This bill, H. 2817, is again recommended in this report, see pp. 92-93.

(pp. 28-31). Referred to the Special Commission on Blasting by Resolves, Chapter 142.

Assignment of counsel and compensation in non-capital cases—draft act (pp. 17-20). Referred by order to Senate Ways and Means Committee for study.

Negative Recommendations Followed on Bills Referred to the Council for Reports in 1957

The following negative reports of the Council on bills referred were followed by the legislature. *The reasons for each negative report appear on the pages of the 33rd report (of 1957) referred to below.* The Council reported adversely on:

A bill placing the entire judicial system under the jurisdiction of the Commonwealth. (Pages 20-22.)

A bill abolishing the defence of contributory negligence and in place thereof to adopt the doctrine of comparative negligence. (Pages 22-23.)

A bill as to the allowance of bills of exceptions in criminal cases. (Page 24.)

A bill for a lien in favor of hospitals for services rendered to persons injured as a result of accident. (Page 25.)

A bill as to actions for the specific performance of oral contracts. (Pages 32-33.)

A bill as to increasing the amount of damages that may be recovered in actions for death due to negligence. (Pages 34-35.)

A bill as to the determination by district courts of the rights of certain injured employees to compensation under the Workmen's Compensation Act. (Pages 36-38.)

A bill to provide for blood grouping tests to aid in the determination of paternity. (Pages 41-43.)

A bill to confer limited equity jurisdiction on the municipal court of the city of Boston and granting the district courts jurisdiction in equity in reach and apply cases. (Pages 43-46.)

A bill as to the renting or hiring of motor vehicles. (Pages 46-47.)

Eminent Domain

Seven bills recommended by the Special Commission in its report on this subject were referred to the Council (listed on p. 70 of the 33rd report). All of these proposals were discussed but *not* recommended by the Council for the reasons stated (pp. 71-80) with one exception. The Council approved the repeal of the act allowing assessed valuation as evidence of value in takings (see pp. 78-79). None of the recommendations of the Commission were adopted. Six other bills relating to eminent domain were referred to the Council (and listed on p. 70). The Council reported in the negative on five of them. The 6th relative to acquisition of land for town ways was approved and adopted as Chapter 240 of 1958.

The bill recommended by the Council and not reported is renewed in this report (p. 93).

Reports Requested by the Legislature in 1958 on the "Subject Matter" of the Bills Referred

These are all listed in the table of contents and will be discussed in this report.

REPORT ON RESOLVES, 1958—CHAPTER 121

Resolved, That the judicial council be requested to investigate the subject matter of current senate document numbered 724, relating to the operation of motor vehicles, especially with reference to the penalties for manslaughter and other offences causing death or injury, and to include its conclusions and its recommendations, if any, in relation thereto, together with drafts of such legislation as may be necessary to give effect to the same, in its annual report for the year nineteen hundred and fifty-eight. *Approved July 21, 1958.*

There was a tragic motor vehicle accident in Haverhill in March 1958 resulting in the death of a child. At the subsequent trial of the driver in the District Court on charges of driving to endanger and without having the license or registration in the car, the defendant was found guilty on all three charges. Fines amounting to $20.00 on the first charge and $5.00 each on the others were imposed, making a total of $30.00.

The tragedy naturally shocked the community and as there was public criticism of the penalty of $30.00 as too small, a resolve was filed for investigation by a special commission of penalties in cases of motor accidents causing death or injury. Before its passage, the resolve above quoted was substituted, referring the matter to the Council. No specific proposal for legislation is mentioned in the resolve but some members of the legislature and various public officials and others were reported, repeatedly, in the press, as favoring more severe penalties, suggesting that the courts were too lenient, suggesting greater money penalties and favoring an investigation. Since the passage of the resolve the Council has received the following suggestion from the Commissioner of Public Safety:

"Convictions for manslaughter in such cases are, as you know, few and far between.

"My thought on this subject is that where there is a conviction for driving to endanger or for reckless driving and a fatality occurred as a result of such driving, a jail sentence of six months or more should be mandatory. Furthermore, the court should have no power to suspend the sentence in such a case.

"This change is put forward with the idea in mind that it might well prove to be an effective step in the reduction of our accident rate in the Commonwealth."

As the resolve relates to the always difficult and controversial problems of penalties and the legal questions of administration

as well as the relations between penalties, their effect as deterrents and their effects on the administration of justice, the resolve was printed in the recent October issue of the Massachusetts Law Quarterly with a request for suggestions for the consideration of the Council. The "Quarterly," with this request prominently printed, went to approximately 5,000 lawyers and judges throughout the Commonwealth.

Discussion

In any study of this kind the following questions naturally arise.

First—What is the present law and its operation in practice and why?

Second—What is the purpose of any suggested change and the relation of the change to the purpose?

Third—What are the related problems of administration?

Fourth—What is justice as practically administered under the present or any proposed law?

Under modern conditions Americans want automobiles, and most of them need, or think they need them, if they can get them. A motor vehicle is a dangerous modern machine succeeding the earlier and less, but still, dangerous "horse and buggy," as the customary instrument of travel on the highways. It is to some extent "dangerous," especially in the hands of unskilled operators, to operate one at all. In view of the inevitable possibilities of unforeseen accidents, even the most careful operators (and it is true of pedestrians also) live in a world which is becoming more "dangerous" all the time, but that is simply a modern condition of life that has to be faced and accepted as the starting point of our study.

Where does law enter the picture? Obviously the law must accept the use of dangerous machines on the highways as not legally "dangerous" unless and until such use by somebody becomes more than ordinarily "dangerous," just as it was obliged to do with the "horse and buggy." So the law steps in at that point. We all know, not only from observing other people but by observing our own behavior, that there are degrees of danger in our dangerous world. These introductory remarks may seem so elementary as to be unnecessary, but we believe the study we are asked to make must begin with them if it is to make sense in the motor vehicle world of today when cars dominate life in so many directions. A sentimental approach to the inevitable tragedies will get us nowhere.

Now, what is the law today about motor vehicles and their operation from the point of view of the civil and of the criminal

law? It is varied, voluminous and complicated, but we will limit the discussion so far as possible to driving and its possible consequences and penalties.

Motor vehicles in the criminal law may be, in varying circumstances, the instruments of first degree murder, second degree murder, manslaughter, "driving under the influence of intoxicating liquor" and, by G.L., Chapter 90, Section 24(2)(a) (as part of the section covering a variety of circumstances) we find the provision for two separate offenses with the same penalty, under the second of which the Haverhill accident was brought into court. It reads:

> "Whoever upon any way or in any place to which the public has a right of access operates a motor vehicle *recklessly* or *operates such a vehicle negligently so that the lives or safety of the public might be endangered*—shall be punished by a fine of not less than twenty nor more than two hundred dollars or by imprisonment for not less than two weeks nor more than two years or both;"

The next paragraph, (2)(b), provides:

> "A conviction of a violation of the preceding paragraph of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event, and shall unless the court or magistrate recommends otherwise, revoke immediately the license of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle or has exclusive control of any motor vehicle as a manufacturer or dealer or otherwise, the registrar may revoke the certificate of registration of any or all motor vehicles so owned or exclusively controlled."

Paragraph (2)(c) provides the conditions under which a new license may be issued, etc., and Paragraph 3 provides that prosecution for a *subsequent* offense shall not, unless the interests of justice require such disposition, be placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceedings.

The earlier paragraphs of Section 24 specify the penalties for "driving under the influence" as "a fine of not less than thirty-five nor more than one thousand dollars, or by imprisonment for not less than two weeks nor more than two years or both."

These are the penalties thus far provided by the representatives of the people of Massachusetts, most of whom own, or drive, or otherwise make use of motor vehicles and must continue to do so. And, as one reads the statutes quoted above, do they not provide really severe penalties if imposed by a court after hearing the evidence or if the facts are followed (as they were in the Haverhill case) by revocation of the license to drive (perhaps the most severe result of which many drivers may be conscious in advance as a deterrent)?

Are these possible penalties too lenient in their operation? Justice, of course, cannot be administered wholesale by flat penalties to be imposed, regardless of the facts and the evidence which may vary in each individual case.

This brings us to the administration of the law as it is and the question whether the courts are too lenient in imposing the existing penalties. Here we must remember that the fact that an accident happens resulting in death or injury does not mean that a particular individual is responsible in a civil or in a criminal proceeding. In Reardon v. Boston El. Ry., 247 Mass. 124, Chief Justice Rugg said (p. 126):

> "The mere occurrence of the collision on the highway was no evidence of the negligence of the defendant. This is the rule of our own cases."

About a dozen cases are cited. The fault must be proved in each case to the court or jury and the facts and evidence may differ. A child may suddenly run in front of a car driven by the most careful driver. There may be a sudden glare preventing sight. All kinds of unexpected things may happen suddenly to careful drivers because of the behavior of a pedestrian or somebody or something which cannot be avoided. Judges and juries have to hear the evidence and decide about such things. Surely we would not have it otherwise; and if there is evidence of fault the court has to decide how much fault before imposing sentence. That is why the legislature has made the penalties flexible. Would we have it otherwise? In the thousands of accidents that come before the court, of course, some mistakes of judgment may occur. No law can prevent that. Everybody makes mistakes sometime.

We must also remember that in every criminal case there may be an appeal for jury trial and if juries believe the penalty is too severe on the facts and evidence frequently they will not convict. We are informed by inquiry at the registrar's office that about 40% of the jail sentences appealed from the District Courts are lost on appeal in jury trials in the Superior Court. The legislature has recognized this even in first degree murder cases by giving the jury power to decide between capital punishment and life imprisonment in case of convictions. The so-called "technicalities" of the earlier criminal law in England, when there were more than 100 capital offenses, developed because the courts and juries were for many years more just than the majority of the legislature or of the public, and the courts found technical flaws in procedure, while juries, as Blackstone said, committed "pious perjury" by finding against the evidence because they thought the death penalty too

severe in the particular case. The same sort of thing was true to a varying extent during "prohibition."

The Meaning of a Criminal Statute

There is another fact to be remembered in connection with the statute above quoted about operating a car "negligently so that the lives or safety of the public might be endangered." It has been called to our attention that there have been, and still are, marked differences of opinion and practice as to its meaning. Are the dominant words the adverb "negligently," or the word "endangered" or the whole clause read together?

Returning to our introductory discussion, we have pointed out that under the dangerous conditions of our automobile necessities for travel "the law must accept the use of dangerous machines on the highways as not legally 'dangerous' unless and until such use by somebody becomes more than ordinarily 'dangerous.' "

In the Wisconsin Law Review for March 1958 (at p. 210) this is explained as follows:

> "The primary function of the ordinary negligence concept is determining whether a person should be required to pay damages. The function of the negligence concept in the criminal law is in determining the sort of conduct which is, although inadvertent, sufficiently dangerous to warrant criminal sanction. Since the emphasis is upon the conduct it follows that the distinction should be based upon the dangerousness of the conduct; that is, the conduct must contain a greater risk of harm than is necessary to form a basis for tort liability only."

When our statute is approached in this way we think its criminal meaning is clear on its face.

An editorial in the Haverhill Journal of April 24, 1958 contained the following comment which seems pertinent:

> "The result of thinking that 'negligent' driving, plus injury, equals driving to endanger, has been that easy convictions are obtainable. And the natural results of these easy convictions are easy, light sentences."

This may be so when a criminal statute is interpreted in a civil sense.

We think closer thinking about the nature and interpretation of the *criminal* offense may relieve the courts of the criticism of "leniency" by demonstrating the purpose on the face of the statute to provide the *existing* serious penalties only for aggravated dangerous operation—aggravated beyond the basis of a civil suit for damages. Even then justice, obviously, will require proof beyond the mere fact of a death or injury from an accident, the mere occurrence of which proves nothing without evidence of fault and when dis-

tinctions in the law exist, even in a civil case, as Chief Justice Rugg stated flatly in Altman v. Aronson, 231 Mass. 588, at p. 593, "a party has a right to insist that the jury be instructed in conformity to them." See also Tompkins v. Pratt, 1958 Advance Sheets 131-2, where the case is cited in connection with the evidence. This rule, obviously, applies with even greater force in a criminal proceeding.

Turning now to the suggestions of more frequent charges of manslaughter and for increased penalties.

1. Manslaughter—it is a common law crime of homicide in circumstances less deliberate than 2nd degree murder. It is not confined to motor vehicles and not defined by statute, but the penalty by G.L. Chapter 265 is:

> "*Section 13.* Whoever commits manslaughter shall be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years."

It may consist of causing death by any means with an automobile, a railroad train, or anything else from beating with a club to starving one's wife by failing to feed her. (See forms for indictment in G.L. Chapter 277.) For what seem to us obvious reasons, as pointed out by the letter of Gen. Whitney, a charge of manslaughter is not often made by a prosecuting officer or grand jury in motor accidents as a matter of judgment on the facts and strength of the evidence.

2. Driving "recklessly" is a separate offense in the same paragraph and subject to the same flexible penalty as driving "negligently so that the public might be endangered." While the two offenses may be combined in the facts, obviously the word "recklessly" is more culpable and harder to prove than "negligently so that." It is a question of state policy whether the penalty for "reckless" driving should be increased when it results in death or injury and if so how much. As already indicated, the penalties are now severe.

3. Driving "under the influence" raises the same question of policy.

4. Finally, operating "negligently so that," an offense the meaning of which is variously and ill advisedly interpreted, as already explained.

These last two offenses are the most common criminal charges and the statutory maximum penalties are already severe if and when imposed.

Why are they not imposed more often when the highway acci-

dents appear in the newspaper headlines daily and shock the community? We think the members of the legislature who know their constituents must know the reasons better than anyone else. Our own belief is that the automobile mindedness of the great majority of the American people, including the population of Massachusetts, not only does not want to be subjected to more severe penalties under the uncertainties of evidence, but often resents their imposition.

So we get back to our starting point—the increasing danger of living with and needing dangerous machines on the roads and the question how dangerously do the great majority of people want to live and, to what extent will the imposition of more severe penalties act as a deterrent. In our opinion more severe minimum penalties would not deter at all. The Commonwealth is partly responsible for the dangers because it encourages them with more and more roads and traffic conditions of congestion and makes possible greater speed with more powerful and dangerous cars to serve the demands of the automobile population.

In our judgment the safety of the community and the reduction of accidents will not be accomplished by increasing penalties, but by other methods—by safety campaigns for educating drivers and pedestrians, young children and their parents, safety devices to make cars less dangerous and other ways of preventing and reducing danger, rather than more severe punishments for inevitable danger which, even if enforced affect only individuals (sometimes probably unjustly), but do not greatly deter others.

For these reasons we do not recommend increases in penalties which are already severe.

As to the suggestion of mandatory jail sentences in cases resulting in death, we oppose such a measure. There is a little book, "Guide for Sentencing," prepared by the Advisory Council of Judges of the National Probation and Parole Association, of which the Chairman was Hon. Bolitha J. Laws, Chief Judge of the United States District Court for the District of Columbia. In Chapter 5—"Selecting the Disposition," appears the statement, "The best sentencing statutes are those which permit the judge a choice among the whole range of dispositions." We agree with that statement.

We have, however, one suggestion for legislation which may help in the more just administration of the statute about operating "negligently so that the lives and safety of the public might be endangered." In the discussion of the meaning of the criminal statute we have already pointed out that there have been, and are, differences of opinion and practices on the question whether the dominant words are the adverb "negligently" or the word "en-

dangered," or the whole clause read together. While we think the whole clause read together demonstrates its aggravated criminal meaning, we think the use of the word "negligently," which, when standing alone, may have two different meanings, has caused the differences of opinion and practice. We think these differences, which may lead to unjust discriminations in the administration of the statute, can be avoided by less ambiguous wording. We, therefore, recommended the following:

DRAFT ACT

Chapter 90 of the General Laws as most recently amended is hereby further amended by striking out in Section 24(2)(a) the words "negligently so that the lives or safety of the public might be endangered" and substituting the words "so dangerously under the circumstances in which he finds himself that he should be conscious that he is threatening the lives and safety of the public."

SENATE 104. TO IMPOSE A PENALTY FOR OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF NARCOTIC DRUGS

(Referred by Resolves, Chapter 21)

The report on this bill is a continuance of our report on penalties under Resolves, Chapter 121.

We do not recommend this bill.

Section 2 which contains the substance of the bill provides:

"SECTION 2. Paragraph (1)(a) of Section 24 of said Chapter 90, as amended by Chapter 145 of the Acts of 1938, is hereby further amended by inserting after the word "liquor," in line 4, the words (printed below in italics) so as to read as follows:—(1)(a) Whoever upon any way or in any place to which the public has a right of access operates a motor vehicle while under the influence of intoxicating liquor *or narcotic drugs*, as defined in section one hundred and ninety-seven of chapter ninety-four, or while his ability to operate a motor vehicle safely is so materially impaired by the effects or side effects of any substance that the lives or safety of the public might be endangered, shall be punished by a fine of not less than thirty-five nor more than one thousand dollars, or by imprisonment for not less than two weeks nor more than two years, or both."

Section 1 merely amends Section 21 of Chapter 90, as amended by Chapter 669 of 1954, to include authority of a uniformed officer to arrest without warrant.

Drugs are very different from liquor. The dangerous drugs can be legally obtained only on a doctor's prescription. As to illegally obtained drugs, Sections 197 (defining narcotic drugs) to 217D of

Chapter 94 are full of regulations and penalties relating to illegal drugs without a doctor's prescription.

A drug addict is primarily a sick person and if his addiction appears to be the *real cause* of *his* dangerous driving the real deterrent to *his* driving is not a severe penalty or any penalty, but the prompt revocation of the license for unfitness. A drug addict who is driving recklessly or dangerously can be brought before a court now under Section 24, 2(a) like anyone else. The proposed bill would in our opinion complicate law enforcement which is already sufficiently complicated and would deter nobody.

As we have already suggested, safety of highways calls for more carefully thought out measures than piling up criminal penalties. This seems especially true in connection with sick men like drug addicts.

H. 1487, RELATIVE TO CARE AND PROTECTION OF CHILDREN

(Referred by Resolves, Chapter 24)

This bill filed by Judge John J. Connelly of the Boston Juvenile Court and others contains five sections each amending certain details of practice in the administration of the juvenile jurisdiction.

We recommend the passage of the draft act hereinafter submitted containing the substance of H. 1487 for the following reasons:

By Chapter 646 of the Acts of 1954 a somewhat wholesale revision was adopted. This repealed the first 51 sections of G. L. Chapter 119 (as theretofore existing) relating to administration of the juveniles and substituted 39 new sections. As occasionally happens owing to the pressure of business the practical effect of new phraseology in such legislation is not always fully realized before its passage. In our opinion this was true with unfortunate results in five of the sections of the act of 1954, the wording of part of which weakened the judicial authority in the administration of the juvenile jurisdiction in ways which seem opposed to the interests of the public, of the children and of the parents.

The original act creating that jurisdiction for the District Courts was adopted as Chapter 413 of 1906 in the same year that the Boston Juvenile Court was created by Chapter 489 as a separate special pioneer court to administer the jurisdiction in the Central district of Boston. The dominant purpose then, as now, in our

opinion, appears in Section 2 of Chapter 413 of 1954 (now Section 53 of G. L. Chapter 119) which provides:

> "§ 53. Proceedings Not to be Deemed Criminal.—Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody, and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings. (1906, 413, § 2.)"

This section refers to a judicial proceeding relating as provided in the preceding Section 52, to "delinquent" and "wayward" children, and incidentally their parents or custodians for the protection equally of the public, the child and the parents.

It is a very carefully and concisely worded section modifying the strictness of the criminal law and recognizing the broader general principle involved in the judicial practice of probation first recognized in Massachusetts before there were any statutory provisions by Judge Thacher about 1830 and later developed through the services of John Augustus—the pioneer probation officer. (See "Probation as an Orthodox Common Law Practice in Massachusetts," 2 Mass. Law Quarterly, No. 6, August 1917, pp. 591-639, reprinted in the Journal of Criminal Law and Criminology for May-June 1941 in connection with the Centennial Anniversary of John Augustus.) The section provides that the jurisdiction "as far as practicable" shall not be "criminal" but does not say that it is merely "civil." It seems accurately described by the forgotten word "prudential" first used in Liberty 66 of the Body of Liberties of 1641, and in 1646 in a law authorizing town authorities in charge of "prudential affairs" to present to the Quarter Court all idle and unprofitable persons and all children who are not diligently employed by their parents. (See 13 Mass. Law Quarterly, No. 3, Feb. 1928, pp. 107-8.) This forgotten history is mentioned to emphasize the judicial functions of a Juvenile Court and the need of preserving those functions. That is the purpose of H. 1487.

The act of 1954 interfered with those functions in the five sections mentioned in H. 1487 by the use of the mandatory word "shall" and the omission of certain provisions as to the discretionary functions of the court, in such a way as to subject the courts and the children inadvisedly, and probably illegally, to the apparent control of the welfare department, a purely administrative body.

We believe the sections should be amended to remove the clouds thus created on the jurisdiction of the courts.

We have received a statement on behalf of the petitioners (printed in Appendix B) containing a detailed account of the practical operation of the present sections of the acts of 1954 on the administration of juvenile jurisdiction and in support of the proposed amendments. For the reasons summarized above, it is, in our opinion, convincing.

We also received from the Commissioner of the Department of Public Welfare a statement in support of the present law of 1954 and in opposition to the proposed changes contained in H. 1487. We print this statement in Appendix C.

We have slightly revised H. 1487 and recommend the following:

DRAFT ACT

AN ACT RELATIVE TO THE CARE AND PROTECTION OF CHILDREN.

SECTION 1. Chapter 119 of the General Laws is hereby amended by striking out section 24, as appearing in section 1 of chapter 646 of the acts of 1954, and inserting in place thereof the following section:—

Section 24. The Boston juvenile court, or the juvenile session of any district court of the commonwealth, except the municipal court of the city of Boston, upon the petition of any person alleging on behalf of a child under the age of sixteen years within the jurisdiction of said court that said child is without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper attention of parent, guardian with care and custody, or custodian, and whose parents or guardian are unwilling, incompetent or unavailable to provide such care, may issue a *summons or* precept to bring such child before said court, shall issue a notice to the department and shall issue summons to both parents of the child to show cause why the child should not be committed to the custody of the department of public welfare, or other appropriate order made. If after reasonable search no such parent can be found, summons shall be issued to the child's lawful guardian, if any, known to reside within the commonwealth, and if not, to the person with whom such child last resided, if known. Upon the issuance of the summons or precept and order of notice the court *may* appoint a person qualified under section three to make a report to the court under oath of an investigation into conditions affecting the child. Said report, *if ordered,* shall, *when filed,* be attached to the petition and be a part of the record.

SECTION 2. Chapter 119 of the General Laws is hereby amended by striking out section 25 as appearing in section 1 of

chapter 646 of the acts of 1954 and inserting in place thereof the following section:—

Section 25. When such child is taken into custody on said *summons or* precept and brought before said court, it may then hear said petition, or said petition may be continued to a time fixed for hearing, and the court may allow the child to be placed in the care of some suitable person *or charitable corporation upon furnishing surety for the further appearance of said child;* or the child may be committed to the custody of the department until surety is furnished, pending a hearing on said petition.

SECTION 3. Chapter 119 of the General Laws is hereby amended by striking out section 26 as appearing in section 1 of chapter 646 of the acts of 1954, and inserting in place thereof the following section:—

Section 26. If the child is identified by the court and it appears that the precept and summonses have been duly and legally served, and that said notice has been issued to the department, the court may excuse the child from the hearing and proceed to hear the evidence. If the court finds the allegations in the petition proved within the meaning of this chapter it may adjudge that said child is in need of care and protection, and may further continue said petition and allow the child to be placed in the care of some suitable person or charitable corporation upon furnishing surety for the further appearance of the child before said court whenever said court may require; and said court may make such further orders with reference to the care and custody of the child as may be conducive to his best interests; or said court may commit the child to the custody of the department until he becomes twenty-one years of age, or for a less time; and the department may discharge said child from its custody whenever the object of his commitment has been accomplished. The court may, in appropriate cases, after a hearing as provided for in section twenty-eight, order the parents, or parent, or guardian of said child to reimburse the commonwealth or other agency for care.

SECTION 4. Section 27 of chapter 119 of the General Laws, as inserted by section 1 of chapter 646 of the acts of 1954, is hereby amended by inserting after the word "and", in line 7, the following words:—if said parent, guardian or other person, appearing on behalf of the child fails to provide the surety fixed by the court; *and by striking out the words "or licensed children's foster care agency."*

SECTION 5. Section 28 of chapter 119 of the General Laws, as inserted by section 1 of chapter 646 of the acts of 1954, is hereby amended by adding at the end thereof the following sentence:—Where the parent, guardian or other person fails to

carry out the order of payment, the court, on petition by the person or agency aggrieved, after notice, may cite such parent, guardian or other person *to show cause why he should not be held in* contempt of the court's order, and after a hearing on the contempt citation may sentence the parent, guardian or other person to imprisonment until the order is complied with, but not for more than one year.

Note on Section 5

The practical operation of the present section 28 of chapter 119 for payment by the parents for the care of a child is shown by the table of receipts in Appendix B of this report. The reason for the proposed addition to section 28 is stated by the petitioner as follows:

"General Laws, Chapter 119, Section 28 [now] gives the court jurisdiction over determining the ability of parents to pay for the care of their children if placed away from them, but does not provide how the orders of payment can be enforced against those parents who could pay but won't pay. It is unfair that certain parents can refuse to carry out the order of the court when most of the parents do carry out the order. For the same reasons the proposed [Section 5 of] House 1487 applies also to delinquent children who are placed away from home.

H. 1305, H. 1307, AND H. 622, RELATIVE TO THE LIABILITY OF PARENTS FOR DAMAGE CAUSED BY CHILDREN

(Referred by Resolves, Chapter 35)

H. 602 would provide for "an action of tort" in an amount not to exceed $300.00 for malicious or wilful destruction of property.

We do not recommend an action of tort. We think reparation should be part of the juvenile jurisdiction, as provided in H. 1305, with a limit of $300.00.

H. 1307 would amend Section 62 of G. L. Chapter 119 by inserting words to require restitution or reparation to the injured person by parents or guardians "as a condition" of placing a child on probation.

We think the provisions of H. 1305 are better. Section 62 now provides for restitution or reparation *by the child* but does not cover the parents. We think the jurisdiction should cover the parents within the limit of $300.00, as provided in the draft act submitted below.

H. 1305 is similar to H. 1307, but proposes a new Section 62A to protect the rights of parents by requiring notice to them and a right to be heard before an order is made by the court.

H. 1305 also provides for procedure to show cause to enforce

orders to pay and an increase in the penalty for contributing to delinquency from $50.00 or 6 months to $500.00 or 1 year in view of the appalling increase in damage by delinquents.

In view of the fact that parents are to a considerable extent to blame indirectly for injury or damage caused by delinquent children, we believe that a limited discretionary civil penalty would, in many cases, emphasize that responsibility in the mind of the parent and thus help in juvenile administration. Therefore, the court should have jurisdiction to order restitutions within limits as it now has under Section 28 in ordering payment for the care of the child (see Appendix E). Of the three bills referred, as already indicated, we believe the limit of $300.00 suggested in H. 602 should be inserted in H. 1305 and, with that insertion and certain other perfecting changes, we recommend the substance of H. 1305 in the following:

DRAFT ACT

AN ACT PROVIDING THAT A PARENT OR GUARDIAN FAILING TO CARRY OUT A COURT ORDER FOR PAYMENT FOR THE SUPPORT OF CERTAIN CHILDREN COMMITTED TO THE DEPARTMENT OF PUBLIC WELFARE AND CERTAIN CORRECTIONAL INSTITUTIONS MAY BE ADJUDGED IN CONTEMPT; PROVIDING FOR LIMITED CIVIL LIABILITY OF CERTAIN PARENTS OR GUARDIANS FOR INJURIES CAUSED BY CHILDREN; AND INCREASING THE PENALTY WHICH MAY BE IMPOSED ON A PARENT OR GUARDIAN AIDING IN THE DELINQUENCY OF A CHILD.

SECTION 1. Section 58 of chapter 119 of the General Laws, as most recently amended by chapter 385 of the acts of 1948, is hereby further amended by adding at the end thereof the following sentence:—Where the parent, guardian or other person fails to carry out the order of payment the court, on petition by the person or agency aggrieved, after notice, may cite such parent, guardian or other person to appear and show cause why such person should not be adjudged in contempt of the court's order, and after a hearing of the contempt citation may sentence the parent, guardian or other person to imprisonment until the order is complied with, but not for more than one year.

SECTION 2. Said chapter 119 is hereby further amended by inserting after section 62 the following section:—

Section 62A. If, as provided for in section sixty-two, the court determines that restitution or reparation should be made to the injured party and the court finds cause the court may order that the parents, guardian or other responsible person make restitution or reparation to the injured person to such an extent and in such sum as the court may determine, not exceeding $300.00. No order for the payment of money shall be entered until the parents, guardian or other responsible person by whom payments are to be made shall have been summonsed before the court and given an opportunity to be heard. If the payment is not made at once, it shall be made through the probation officer who shall give a receipt therefor, keep a record of payment, pay the money to said injured person, and keep on file his receipt therefor.

SECTION 3. Section 63 of said chapter 119, as appearing in section 1 of chapter 95 of the acts of 1932, is hereby amended by striking out, in lines 6 and 7, the words "fifty dollars or by imprisonment for not more than six months" and inserting in place thereof the words:—five hundred dollars or by imprisonment of not more than one year or both.

H. 932, H. 605, H. 2394 RELATIVE TO THE ADMISSIBILITY OF CHEMICAL TESTS OF ALCOHOLIC BLOOD CONTENT AS EVIDENCE OF BEING OR NOT BEING UNDER THE INFLUENCE OF INTOXICATING LIQUOR WHILE DRIVING MOTOR VEHICLES (REFERRED BY RESOLVES CHAPTER 26)

The subject matter of these three bills has been under discussion throughout the country for about 20 years and in Massachusetts for some 10 years with the support of the National Safety Council, committees of the American Medical Association and American Bar Association and other bodies devoted to highway safety. H. 932 was introduced by the Massachusetts Safety Council and is recommended with certain omissions as appears below. In approaching these bills we have before us:

1. INFORMATION AS TO HOUSE NO. 932 SUBMITTED BY MASSACHUSETTS SAFETY COUNCIL CHEMICAL TESTS FOR INTOXICATION.

Since the consumption of alchohol by drivers is one of the major factors in the causation of traffic accidents, scientific evidence is needed to aid in combating this problem. The Massachusetts Safety Council recommends the adoption of chemical test legislation as set forth in House No. 932. This bill combines Sec. 11-902 of the Uniform Vehicle Code of the National Committee on Uniform Laws and Ordinances and Implied Consent provisions recommended by the National Safety Council.

FACTS SUPPORTING CHEMICAL TEST LEGISLATION

Defendants and enforcement agencies will have the benefit of scientific evidence in the determination of innocence or guilt in cases involving driving under the influence of alcohol. This will protect the innocent as well as aid in convicting the guilty.

It is an established physiological fact that the concentration of alcohol in the circulating blood is a reliable index of the degree of alcohol influence. It is *not* necessary to take a sample of blood to determine the concentration for it also may be determined by a simple breath test. (Jour. of the Amer. Med. Assn. 124:1292, April 29, 1944)

Courts throughout the United States, as well as in Massachusetts, have ac-

cepted the use of chemical tests for intoxication. In 141 reported decisions to test legality, no court has reversed a case on the grounds that the chemical tests to determine alcohol influence and its degree are not valid. (Commonwealth v. Capalbo, 308 Mass. 376, 32 N. E. 2d 255, 1941)

Twenty-seven states now have chemical test laws modeled after Sec. 11-902 of the Uniform Vehicle Code and four of these states have adopted the Implied Consent provisions. The only states which do not have either chemical tests established by statute or used by the state enforcement agency are Alabama, MASSACHUSETTS, and Mississippi.

There are at least 100 ailments with symptoms resembling those of alcoholic intoxication. There have been cases in MASSACHUSETTS of persons dying because they were arrested for drunkeness or drunken driving when they were actually suffering from a physical ailment. A scientific test, applied immediately, would eliminate that.

The Massachusetts Safety Council believes that House No. 932, which sets nationally accepted standards for scientific evidence, will make Massachusetts drivers realize that they will be automatically and uniformly convicted if they drive under the influence. The objective is to make drivers realize this *before* they start drinking, *not* in court *after* a serious accident has occurred.

Additional information may be obtained by contacting Bruce Campbell, Manager, Massachusetts Safety Council, 31 State St., Boston. Tel. No. LA 3-1135.

2. The Practical Meaning of .05 and .15 of 1 per cent of Alcohol in the Blood.

In an article in the "American Practitioner" for March 1947, circulated by the American Safety Council, Dr. Clarence Muelburger [still a leading authority] toxicologist of the Michigan State Department of Health, says as to the percentages,

"While these quantities of alcohol seem almost negligible, it should be realized that the average adult requires two twelve ounce bottles of beer or two one ounce glasses of whiskey to bring the individual up to the lower blood content of .05 of one per cent. To reach the level of .15 (of one per cent) the average man must consume six or eight bottles of beer or six or eight ounces of whiskey."

"In an article by Bernard M. Mafet, reprinted from the American Journal of the Journal of Criminal Law and Criminology (vol. 36, No. 2 for July and August 1945), it is stated, in Note 10 to p. 134, that the American Medical Association has accepted these tests as reliable indices of the degree of intoxication, reference being made to the 1944 report of the Committee to study Problems of Motor Vehicle Accidents, of the American Medical Association. It was approved by the House of Delegates of that Association on June 13, 1944.

"Such scientific proof should be very helpful to the judge or a jury in a close case where otherwise the reliance has to be on personal opinion more or less biased on both sides. It will also enable an innocent automobile operator who has had the misfortune to have an accident and be found by the police to have a breath induced possibly by one or two highballs to clear himself. The bill would not compel him to submit to a blood test, nor does it permit the introduction into the evidence of the fact that he refuses to take a blood test, nor does it make the evidence conclusive."

3. Medical research has continued and reports of experience by committees, commissions and individuals have been made and published. Perhaps the latest thorough study is a report of the New York State Joint Legislative Committee on Motor Vehicle Problems in 1953 (Legislative Document #25 of that year) in regard to chemical tests.

As stated in the "Foreword" the report was prepared "with the assistance of the Legislative Drafting Research Fund of Columbia University" and "discussions with local police officials, judges, bar associations, medical associations and with National groups such as National Safety Council and the American Association of Motor Vehicle Administrators." The report covers about 30 pages with supporting references to judicial opinions and discussions (a list of which covers about two pages at the end of the report). We reprint in Appendix F extracts of the report relating to the subjects of the bills referred to us.

The chemical tests have encountered no difficulty in the courts where the test was taken with the consent of the accused. They have admitted the result of tests of blood, urine and breath.

In this connection see the opinion of our Supreme Judicial Court in Com. vs. Capalbo 308 Mass. 376 in 1941 referred to in the memorandum of the Mass. Safety Council already quoted. That memorandum points out that today "27 States now have chemical test laws modeled after Section 11-902 of the uniform vehicle code (like H. 932 without Section 5 as to implied consents)" and 4 of them include implied consents which we discuss presently.

We have set forth this information at some length to show what has been going on both in medical science and law for the past 25 or 30 years outside of Massachusetts. We see no reason why we in Massachusetts should continue to ignore all this information and experience. We think the time has come for us to learn, to recognize and to take advantage of it in the public interest not only of safety of the highways, but to assist the courts and law enforcement officials in the fair administration of justice.

In Massachusetts and presumably elsewhere, juries have been slow to convict defendants in drunken driving cases, the reason in part being that often the evidence is largely, if not exclusively, the testimony of police officers. This testimony is opinion evidence which may not impress the jury, none too inclined to accept police testimony. Chemical tests supply evidence of a more substantial and credible nature. Experience in other states shows that this evidence is much more likely to be accepted.

The reason for the proposed legislation such as H. 932 is to simplify the process of presenting to the court the results of years of medical experience. Without this enabling legislation witnesses, necessarily experts, must be produced to satisfy the court of the scientific basis for the percentages involved. The legislation puts the burden on the defendant of refuting the presumption by attempting to demonstrate the falsity or unreliability of the percentages. In view of the general acceptance of the scientific soundness of the percentages, it will be difficult for the defendants successfully to rebut the presumption.

In Appendix E strongly corroborating the soundness of the basis for the percentages is the result of a chemical test clinic at Holy Cross College, April 24, 1957. Four individuals participated in the clinic. In the charts they are labelled No. 2, No. 4, No. 6, No. 8. These figures represent the number of ounces

of whiskey consumed by the individuals. The individuals were tested before and after drinking. The results are quite suggestive. This clinic was conducted under the auspices of the Worcester County Safety Council.

It is to be borne in mind that there is nothing mandatory about this legislation. It requires no community to do anything. The law enforcement authorities determine whether they will use blood tests and it is for them to choose the method. That this is fair to the motorist is evidenced by the support of the American Automobile Association nationally, and locally by the Boston Automobile Club affiliated with the A.A.A.

For practical reasons we do not, for the present, recommend the inclusion of Section 5 of H. 932. We do not recommend the inclusion of a time limit as appears in the New York Statute. We prefer the use of the word "presumption" to "prima facie evidence." Neither do we recommend the provision in H. 2394 making a second offense of driving under the influence a felony, punishable by imprisonment of not less than 90 days. This will merely make it more difficult to get already reluctant jurors to convict. The present law is severe enough to cover any case particularly with the Registrar of Motor Vehicles revoking the license.

We believe that H. 932, *without Section 5*, relating to implied consent, should be enacted as follows:

DRAFT ACT

House 932 (with Section 5 omitted)

AN ACT ESTABLISHING CERTAIN TESTS OF ALCOHOLIC BLOOD CONTENT AS PRESUMPTIVE EVIDENCE OF NOT BEING UNDER THE INFLUENCE OR OF BEING UNDER THE INFLUENCE OF INTOXICATING LIQUOR WHILE OPERATING A MOTOR VEHICLE.

Section 24 of chapter 90 of the General Laws, as amended, is hereby further amended by adding at the end of paragraph (1) (*a*) the following:—In any criminal prosecution for a violation of this section relating to driving a vehicle while under the influence of intoxciating liquor, the amount of alcohol in the defendant's blood at the time alleged, as shown by chemical analysis, with the defendant's consent, of the defendant's blood, urine, breath or other bodily substance, shall be admissible and give rise to the following presumptions:—

1. If there was at that time *0.05 per cent or less* by weight of alcohol in the defendant's blood, *it shall be presumed that the defendant was not under the influence of intoxicating liquor.*

2. If there was at that time in excess of 0.05 per cent, but less than 0.15 per cent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

3. If there was at that time *0.15 per cent* or more by weight of alcohol in the defendant's blood, *it shall be presumed that the defendant was under the influence of intoxicating liquor.*

4. The foregoing provisions shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor.

5. Upon the request of the person who was tested, the results of such test shall be made available to him.

6. Only a physician acting at the request of a police officer with the defendant's consent can withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen.

7. The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.

BILLS REFERRED INVOLVING THE ORIGINAL PURPOSE OF THE RECORDING ACTS

Introduction

The background of the rapidly increasing public and private need for carrying out the original "intent" of our recording acts is demonstrated in a recent comprehensive report by a committee of the Section of the American Bar Association on "Real Property, Probate and Trust Law." This report of 24 members from widely scattered states, with Albert B. Wolfe of the Boston bar as Chairman, was submitted at the A.B.A. Meeting in August 1958. Mr. Wolfe is also one of the petitioners for H. 1995 and one of the draftsmen of the revised draft of S. 387 (both referred to the Council by Resolves, Chapters 13 and 16).

EXTRACTS FROM THE A.B.A. COMMITTEE REPORT

"The needs for increased efficiency in our recording systems and conveyancing practices continue to grow, and apparently in most states at a rate outpacing that of measures designed to meet them, but there are indications of increasing interest in such measures.

"The urgency of these needs has been stressed repeatedly in addresses and reports of committees printed in Proceedings of this Section, and by experts in the field. The mushrooming volume of records, the wastefulness of repeated and ever lengthening searches, and the cumulative effects of conveyancer's natural fears of how the most meticulous next conveyancer will treat each question, have long caused concern. The increases in mobility of population and business, in home ownership, and in mortgage financing, and the shifts from rural to urban land patterns, all strikingly evident since World War II, have necessarily accentuated the problems. We are as yet ill prepared for likely future demands.

"The fact that the searching of records is necessarily done mostly by professional abstracters not members of the bar, whether working for title companies, abstract companies, or practicing lawyers, and that a great many lawyers have never done any abstracting, results in some lack of full understanding by the bar generally, and consequently by courts and legislatures, of the exact processes of search and the importance to the public interest of maintaining reliability of records and definite and reasonably workable rules, even at the expense in some

instances of those whom general concepts of equity would otherwise require to be protected.

"Compared with many other fields of law, there has at times been a singular lack of support by the bar generally for efforts on a national basis to cope with these problems—a tendency to accept the situation as a necessary evil or dismiss it as the responsibility of specialists alone. Further statutory changes will require increased understanding and support from the organized bar. It is submitted that the public interest in maintenance of basic respect for law and order, and in improvement of relations between the bar and the public to this end, require such support. For many families, buying a home and getting a mortgage are the main contacts they have with lawyers in a lifetime. When families suffer from title flaws they lose respect for both law and lawyers. Where the causes could with proper interest by the bar in general be corrected, they may be justified. It seems unfortunately true that the incidence of defects may be particularly high for the small home buyer, perhaps because more valuable properties have justified more careful attention in past transactions."

SENATE 387, TO PROTECT LAND TITLES AGAINST THE EFFECTS OF CERTAIN REFERENCES

(Referred by Resolves, Chapter 13)

SECTION 1. Section 4 of Chapter 183 of the General Laws is hereby amended by inserting after the first sentence thereof the following sentences:—No reference in any instrument recorded after December thirty-first, nineteen hundred and fifty-eight, to such a conveyance or lease shall be actual notice of it or put any person upon inquiry. No reference in any instrument recorded before January first, nineteen hundred and fifty-nine, to such a conveyance or lease shall be actual notice of it or put any person upon inquiry unless such conveyance or lease or an office copy as provided in section thirteen of chapter thirty-six or, with respect to such lease, a notice of lease as hereinafter defined is so recorded before January first, nineteen hundred and sixty.

SECTION 2. This act shall take effect on January first, nineteen hundred and fifty-nine.

We do not recommend this bill but, as its subject matter is of special importance to small landowners who may lose their chance to sell or their opportunity to secure a needed mortgage, we do recommend a substitute bill. This has been drafted with the assistance of the petitioner and other experienced legal advisers of landowners in constant contact with title problems which affect the recording system and the marketability of land throughout the Commonwealth. To demonstrate the need of such legislation, we submit a

BRIEF HISTORY OF THE RECORDING SYSTEM

In the volume of "Ancient Charters and Laws," published in 1814 and containing the early laws of the Colony and Province

compiled from the originals by three of the best informed lawyers in our history—Nathan Dane, William Prescott and Joseph Story—it appears that our recording system began by an act of October 1640:

> "For the avoiding of all fraudulent conveyances, and that every man may know what estate or interest other men may have in any houses, lands, or other hereditaments they are to deal in." (See p. 86.)

This act became Section 4 of Chapter XXVIII of a compilation enacted as law in 1658 (see p. VI), a 5th Section [1641-42] making "the clerk of every shire court" the recording officer. After the Province Charter of 1692, the General Court in 1697 revised the earlier acts into a Chapter XLVIII, with the revised statement of "intent":

> "For the prevention of clandestine and uncertain sales of houses and lands, and to the intent it may be the better known what right title or interest persons have in or to such estates as they shall offer for sale."

The act provided that "the clerk of the inferiour court of pleas in each respective county shall also be the register of deeds and conveyances" and describing his duties. (See pp. 303-305.)

Those introductory statements of legislative intent in 1640 and more fully in 1697, state the practical purpose of the recording acts today not only in Massachusetts, but throughout the nation. Their full meaning, however, which, in our complicated world of today, is more important than ever before, has been obscured and more or less forgotten and weakened during the succeeding centuries, with resulting uncertainty, hardship, law suits, and many obstacles to modern transactions of landowners by sale, mortgage or otherwise.

In 1891 Governor William E. Russell, in his inaugural address, pointed out that for about two hundred and forty years transfer by record deeds, supplemented by prescription based on possession, had apparently satisfied the popular demand, but that, with the modern density of the population, with the greater subdivision of land and increase of real estate transactions, something else was needed. A joint committee and later a special commission were appointed and disagreed, and finally a second special commission of one man—Alfred Hemenway—drafted the act which created the Land Court by which *good* but partly *unrecorded* titles could be made marketable titles *of record*. (See History of the Land Court on its 50th Anniversary, 34 Mass. Law Quarterly, No. 1, January, 1949.)

Meanwhile, in 1893 the late Heman W. Chaplin, an active practitioner in the law of real property wrote an article on "Record

Title to Land" (6 Harvard Law Review 302-314), which has been called the "classic" discussion. He began by stating that "there has been a growing interest in recent years in the question of greater certainty and simplification in land titles." After explaining in detail a considerable number of title difficulties due to lack of record, he said (p. 311):

> *"The question naturally arises, whether the aim of our so-called 'record title' system should not be carried out.* While it is true that every title is exposed to a thousand possible objections by matters not appearing on the records of the registry of deeds, and appearing nowhere in a convenient and accessible manner, it is equally true that in ninety-nine cases in a hundred these elements, in fact, would, upon inquiry, be settled in favor of the supposed title. The difficulty ordinarily lies, not so much in the actual risk of loss of title, as in the delay, expense, and inconvenience of making the inquiry, or of risking the title without it. Titles commonly have to be risked, with a very slight inquiry, upon most of these questions, and to that extent we are transferring titles in this country as they are transferred in countries where titles are passed as they were in the days of the ancient Hebrews, by oral transactions made in the presence of the elders. It is only to a limited extent that we have departed from the ancient usage."

That was in 1893. Sixteen years later, in 1909, in the preface to his volume of "Land Court Decisions," Hon. Charles T. Davis said:

> "The marketability of a title has become a very different question from that as to its actual validity. Dealers and investors in land and in real estate securities demand titles that may be handled swiftly and securely. Questions affecting their marketability frequently cannot, as a matter of practical consideration, await the delay necessary for their adjudication by the court of last resort through the channel of the regular trial courts, nor are some of them determinable by that means. Many of them come before the land court, however, in the ordinary course of its business, and but few have been carried beyond it."

Forty-nine years later, we are still faced with many of the unrecorded difficulties referred to by Judge Davis and earlier by Chaplin in 1893, with the added new difficulties which have accumulated during the past half century. The practical situation faced by landowners, purchasers and mortgagees today in regard to which their lawyers have to advise them is explained by Mr. Richard B. Johnson at the beginning of his article on "The Mechanics of Title Examination,"* as follows:

> "Keep in mind that the practicing conveyancer is a very cautious fellow, not because he likes to be stuffy, but because he wants the title to be so clear that no brother conveyancer will object to it when the land comes up for sale again. It is not just a question of insuring that his client gets a title good enough to stand up in later litigation. The title may be secure against adverse claimants, or it may be good enough to entitle his client to enforce a contract

*Reprinted in the 6th and 7th Editions of Crocker's "Notes on Common Forms."

if he later sells it, but it is not enough to get your client a title that could be sustained by a diligent study of the law or by evidence outside the record. Regardless of the fine points of the law, it has got to be good enough to satisfy a mortgagee's attorney without lengthy citation of cases, or elaborate investigation of outside facts. Therefore, unlike water, careful conveyancers seek the highest level.

"This highest level is not always logical or consistent when carefully scrutinized in the light of the cases and statutes. Sometimes it is above, and sometimes below, the standard that the cases and statutes, particularly the statutes, would seem to indicate. . . . It is almost more important to know what conveyancers think the law is than to know what it actually is."

Some of our problems are common in other states, and how to deal with defects in recorded titles is a matter of current nationwide intensive study, as the problem gets worse with each year's accumulation of defects. Under these circumstances, the Massachusetts Legislature, in the last few years, has taken leading steps to clarify the law and protect the landowners from the alternatives of expensive proceedings in the Land Court or losing the value of their land and the opportunities of sale or of securing a needed mortgage.

Beginning with Chapter 641 of 1954, modifying and clarifying the "rule against perpetuities" (since adopted in Maine and Connecticut), the legislature has adopted a series of leading curative acts—Chapter 258 of 1956 as to ancient possibilities of reverter and rights of entry, Chapter 305 of 1956 as to ancient leases, Chapter 348 of 1956 as to "formal" defects, Chapter 370 of 1957 as to ancient obsolete mortgages, and Chapter 502 of 1957 as to limitation of inheritance tax liens. But, in spite of these advances, we are still short of accomplishing the substantial purposes of our recording system, as stated in 1640 and 1697 in the passages quoted, because of defects *which we can avoid for the future by carefully drafted and informed legislative action.* We have told the story of the recording system at some length, because it points the way to further improvement, which is "the subject matter" of Senate 387, referred to us.

As the A.B.A. Committee points out:

"That the doctrine of notice by recital is in cases of recordable instruments in direct conflict with the primary purpose of our recording acts seems so clear that it has recently been forcefully argued in New Jersey that the courts should now so hold without further legislation. 'By honoring the doctrine we produce this anomalous result: That which the legislature has said shall be void is given life—not by demanding compliance with the legislative mandate, but by imposing upon those who are supposed to be protected by the Recording Act the duty of seeking out those who have negligently or deliberately flouted its terms.'" 12 Rutgers Law Rev. 328 (1957).

The Proposed Substitute Bill

Many hours have been spent by and with experienced practitioners in preparing various drafts and weighing every word in the following draft act to cure defects arising from indefinite references in recorded instruments to unrecorded facts—defects which should be cured in fairness, especially to the small landowners whose titles may be defective because of careless or incompetent drafting of documents somewhere in their chain of title so that they lose the benefit of dealing with their land by sale, mortgage or otherwise. The specific nature of these defects (all familiar to experienced practitioners) are specified in the wording of the proposed bill. An illustration of a defect covered by Clause (3) in the draft act below, is a deed to A "as trustee" with no recorded trust. This is a common and particularly troublesome defect with court opinions in different directions, leaving a prospective purchaser, or mortgagee from A uncertain whether he will get a title or simply a law suit. In 1897, in Swazey v. Emerson, 168 Mass. 118, at p. 120, Mr. Justice Holmes said that the word "trustee" under the recording act is not notice that there *is* a trust but merely that there "might be" one so that it is not a defect. In 1927, in Cleval v. Sullivan, 258 Mass. 348, the court, without discussing or mentioning the Holmes' opinion, said there *was* notice which spoiled the marketability of the land. The Holmes' opinion was based squarely on the recording act, seems the sound one and is followed in the draft act which we submit.

As another illustration, those who are not familiar with the background of our present law of titles may want an explanation of Clause (2), dealing with the defect in a recorded deed (in a chain of title) which, instead of conveying the described *land,* uses the words "all my right, title or interest" in the described land. There are many of such deeds in the chains of recorded titles in registries of deeds in all counties going back for generations, but many careful lawyers will not advise their clients, whether purchasers or mortgagees, to accept them today.

The "indefiniteness" or implication in such deeds differs slightly from the express "reference" (discussed in the last paragraph) by the use of the unexplained word "trustee," in that the "indefiniteness" *arises* from the words, "*my right, title and interest.*" They do not mean that there is any other right, title or interest in someone other than the grantor. They are indefinite because they suggest *on the record* that there *may be* some such outstanding interest. As Judge Davis and others have pointed out, "Most land owners have no knowledge what their title is, all they know is

that they and those through whom they claim have had possession" under some kind of a deed, and so they, or their lawyers, use the cautious words "*my* right, etc." without knowing whether there is any other "right, etc." or not, but that can render the title unacceptable to the next or some future lawyer or purchaser. As Chief Justice Morton said in Dow v. Whitney, 147 Mass. 1 (at p. 6), "A deed of 'all right, title and interest' or of 'all the interest' of the grantor in a lot of land conveys the same title as a deed of the land," and he based his opinion on the purpose of the recording act; but the discussion in the opinion of earlier opinions and the still fuller accounts in Partridge "Deeds, Mortgages and Easements." (1947 Ed., pp. 85-87, et seq.; 1931 Ed., p. 80, et seq.; and Sections 167-168 of the 7th Edition of "Crocker on Common Forms,") show why the words are considered "dangerous" in titles —often more dangerous than they really are.

It seems probable that the frequent use in deeds of the words, *my* "right, title and interest," dates back to their appearance in the act of 1697, already quoted.

"Possession being the foundation of all title to land and prima facie evidence of ownership" (see Hills v. O'Keefe, 189 Mass. 139, at p. 140), it was naturally decided in the early days that a possessory title passes by a deed (see Hall v. Leonard, 1 Pick. 27).

In his address to the bar in 1936, quoted in connection with our report on H. 1995, Judge Davis explained why we have had from the 17th century in Massachusetts "a very strong set of titles on adverse possession, pure adverse possession. It is the best title in the world, but you cannot borrow money on it."

As also stated by him in Browning Petitioner (Land Court Decisions, at p. 7), "the purpose of the land registration act was to cure defects of record, not defects of title" and that is the exact purpose of the draft act which we submit—to remove by legislative prevention defects *of record*, commonly known as "clouds," on titles and to restore in practice and in the doubting minds of the bar and the courts, the original expressed legislative "intent" of our recording act of 1697.

We recommend the following:

DRAFT ACT

AN ACT TO PROTECT LAND TITLES AGAINST THE EFFECTS OF INDEFINITE REFERENCES.

SECTION 1. Chapter 184 of the General Laws is hereby amended by adding the following new section:

Section 25. No indefinite reference in a recorded instrument shall subject any person not an immediate party thereto to any interest in real estate, legal or equitable, nor put any such person on inquiry with respect to such interest,

nor be a cloud on or otherwise adversely affect the title of any such person acquiring the real estate under such recorded instrument if he is not otherwise subject to it or on notice of it. An indefinite reference means (1) a recital indicating directly or by implication that real estate may be subject to restrictions, easements, mortgages, encumbrances, or any other interests not created by instruments recorded in due course, (2) a recital or indication affecting a description of real estate which by excluding generally real estate previously conveyed or by being in general terms of a person's right, title or interest, or for any other reason, can be construed to refer in a manner limiting the real estate described to any interest not created by instruments recorded in due course, (3) a description of a person as trustee or an indication that a person is acting as trustee unless the instrument containing the description or indication either sets forth the terms of the trust or specifies a recorded instrument which sets forth its terms and the place in the public records where such instrument is recorded, and (4) any other reference to any interest in real estate unless the instrument containing the reference either creates the interest referred to or specifies a recorded instrument by which the interest is created and the place in the public records where such instrument is recorded. No instrument shall be deemed recorded in due course unless so recorded in the registry of deeds for the county or district in which the real estate affected lies as to be indexed in the grantor index under the name of the owner of record of the real estate affected at the time of the recording. This section shall not apply to a reference to an instrument in a notice or statement permitted by law to be recorded instead of such instrument, nor to a reference to the secured obligation in a mortgage or other instrument appearing of record to be given as security, nor in any proceeding for enforcement of any warranty of title.

SECTION 2. Section 25 of Chapter 184 of the General Laws shall apply to indefinite references made before the effective date of this act as well as to those made thereafter except that it shall not apply to any interest which appears of record in accordance with this section before the expiration of one year after the effective date. An interest appears of record if (a) there is recorded in the registry of deeds for the county or district in which the real estate affected lies an instrument creating the interest or a notice of claim signed and acknowledged by the holder of the interest fully describing it and specifying his residence and the name of the owner of record of the real estate affected at the time of the recording, and (b), in case of an instrument not so recorded as to be indexed in the grantor index under the name of the owner of record of the real estate affected at the time of its recording, whether before or after said effective date, there is also recorded a notice of recording identifying the instrument and specifying the place of its recording in the registry of deeds and the name of the owner of record of the real estate affected at the time of the recording of the notice. All notices of claim and notices of recording shall be indexed in the grantor index under the name of the record owner specified therein.

H. 1995, "AN ACT TO CHANGE THE TIME FOR COMMENCING ACTIONS TO RECOVER LAND AND FOR MAKING ENTRIES THEREON TO TWENTY-FIVE YEARS IN CERTAIN CASES"

(Referred by Resolves, Chapter 16)

In connection with rights of entry or commencement of actions to prevent prescriptive title to land by twenty years of possession under a claim of right, G.L. Chapter 260 provides:

"§ 25. Disabilities.—If, when such right of entry or of action accrues, the person entitled thereto is a minor, or is insane, imprisoned or absent from the United States, he, or a person claiming under him, may make the entry or commence the action within ten years after such disability is removed.

"§ 26. Death During Disability.—If the person first entitled to such right of entry or of action dies while under any of the disabilities mentioned in the preceding section and there has been no determination of, or judgment upon, the title, right or action which accrued to him, the entry may be made or the action commenced by his heirs, or by any other person claiming under him within ten years after his death."

H. 1995 would amend these sections as follows:

SECTION 1. Sections 25 and 26 of Chapter 260 of the General Laws are each hereby amended by adding at the end thereof the following words:—, if within twenty-five years after the right of action or of entry first accrued.

SECTION 2. Section 1 of this act shall apply to rights of action and of entry existing at the effective date of this act except that action may be commenced or entry made at any time before January first, nineteen hundred and sixty-one, if twenty-five years after the right of action or of entry first accrued have expired before the effective date of this act or expire before January first, nineteen hundred and sixty-one.

REASONS FOR THE BILL

It is another bill to improve the law of real property—this time the law about *unrecorded* title by prescription as a result of twenty years of uninterrupted adverse possession under a claim of right. This bill also will help small landowners, especially in rural communities where there are many of such titles.

In the address of Judge Davis in 1936 at the A.B.A. Meeting in Boston—about a month before he died, after 38 years on the Land Court bench, he said:

"It is an awful mess, the country title in Massachusetts. Our country title is becoming our most valuable one. Our seashore fronts which once were valuable for commercial purposes and shipping went into a long period of innocuous desuetude, and monuments, wharves, and everything disappeared. They came back to summer residences.

"It all depends on where certain ancient monuments were, back before anybody really remembers anything. It takes a long search and a good deal of guessing and a great deal of local testimony to locate what the land was. For example, a deed of one ton and a half of salt hay down on the Cape. It is not a very definite description of the tract of land you are going to acquire the title to, if that is all you have. That depends on what kind of salt marsh land it was. It may have been productive and your ton of hay was only an acre; it may have been most unproductive and it took four or five acres to make it up.

"You get a cow right up on Cape Ann. If the cow was on the land side of the sheltering rocks on Cape Ann, she had pretty good feeding. You get a definite and well-defined parcel of land. If it was on the other side, it might have spread around for acres but you get enough to keep a cow.

"That is the way these old things went. *That, naturally, resulted in our building up a very strong set of titles on adverse possession, pure adverse possession. It is the best title in the world, but you cannot borrow money on it.* They fenced it off. We have them all the time."

In order to be able to borrow money on it one has to establish the fact of adverse possession for twenty years in the Land Court, but in addition to the problem of evidence of possession there is another problem. As one of the unavoidable risks even in a recorded title, Mr. Chaplin, in the article of 1893 referred to (in connection with § 387), said:

"Questions of incapacity to contract, as by insanity or infancy, are not determined by the record of a deed. One who takes what is called 'a good record title' assumes, at his peril, the mental capacity and the full age of all the successive grantors in his chain of title for a long way back. Instances are not lacking in which a bona fide purchaser has lost his title by the establishment of unsoundness of mind or infancy on the part of a prior owner of the land."

That risk is unavoidable, in recorded titles, but in adverse possession the present period of waiting by the possessor beyond the twenty years under Sections 25 and 26 (quoted above) seems unreasonably long and uncertain. As the world grows smaller under the modern facilities of travel for persons and information, 25 years seems adequate to protect rights of absentees who neglect their rights or infants who can have guardians to protect their property or who came of age so that they can protect themselves or insane or feeble minded persons who may and generally do have guardians or conservators to protect their rights.

In the address already referred to, Judge Davis said:

"The birthright went right back to the old Anglo-Saxon theory, or rather, fact, of seizin, which says Sir Frederick Pollock, has become so obscured by the intricacies of our modern record titles, 'it is possible for even learned persons to treat it as obsolete. . . . *Actual enjoyment and control of land and the recognition of peaceable enjoyment and control as deserving the protection of the law are the points that stand* in the forefront of the common law when we take it as presented by its own history and in its native authorities.' "

In Basye's "Clearing Land Titles," title by adverse possession and statutes of limitations are discussed at some length in Sections 52-54. Besides pointing out the legislative trend "to delete altogether or to shorten the additional period allowed to incompetents" (p. 118), he quotes from an opinion of the Supreme Court of Missouri that, "It is a matter of public interest that the titles to real estate shall, so far as practicable, be settled during the generation when such titles become unsettled or clouded, rather than pass the mistakes or even the wrongs of one generation down to be visited upon remote posterity or remote grantees," (p. 117). As Basye says, "Here is expressed a realistic point of view." The full significance of it appears when one remembers that many of such titles depend on perishable evidence and it is common knowledge in the profession that injustice may result from unavoidable death or disappearance of witnesses and the decay or removal of ancient boundary marks, such as trees, rocks, or other evidence.

He also points out that many cases of adverse possession have their origin in an intended transfer of title which is ineffective because of the mistakes or incompetence of someone in the past who drafted the documents.

> "Possession is transferred and, in all probability neither party to the transaction is aware of any irregularity and of the consequent failure of the conveyance. After the grantee has occupied the land for the required period, adversely, of course, supposing that he acquired title under the conveyance—the Statute of Limitation operates quietly and his imperfect title is cured by time,"

as a New England mortgage foreclosure entry may cure or confirm by the lapse of three years a defect in a sale under a power.

In view of all these considerations we think 25 years as suggested in the bill (H. 1995) is an amply fair period to cover everyone, including those who may be under a disability. We think the ancient possessory title deserves the protection provided by H. 1995, and therefore recommend its passage.

H. 1636 TO IMPOSE LIABILITY ON AN ABUTTING OWNER UNDER CERTAIN CONDITIONS

(Referred by Resolves Chapter 20)

The bill reads:

Chapter 84 of the General Laws, as amended, is further amended by the addition of the following section:—

Section 27. If the owner of an estate abutting on any sidewalk or on any public way, creates, permits or maintains on such estate an excavation or other artificial condition which abuts on, or is proxi-

mate to a sidewalk or public way, and if any person, while traveling on or using such sidewalk or public way and while in the exercise of due care, sustains bodily injury or damage to his property by reason of such excavation or artificial condition or by reason of a failure to provide a substantial railing or guard around such excavation or artificial condition, such person shall recover damages therefore from such owner; provided, such owner knew, or by the exercise of proper care and diligence, should have known, that such excavation or artificial condition created or involved an unreasonable risk or hazard to travelers or users of such sidewalk or public way.

The plain object of this bill is to overrule the decision made a little more than one hundred years ago in Howland v. Vincent, 10 Met. 371. The holding in that case is accurately described in the headnote which reads as follows:

> "An owner of land made an excavation therein within a foot or two of a public street and used no precaution against the danger of falling into it. A person passing in the night time went over the line of the street, fell into the excavation and was injured. *Held* that the owner of the land was not liable in an action for the injury thus caused."

This seems to us a harsh rule. Under it, apparently, the land owner can excavate perpendicularly exactly on the line of a public way and leave the opening entirely unprotected so that an unwarned traveller in the exercise of due care, who inadvertently takes a single step outside the limits of the way may be left without remedy. He may have no remedy against the municipality, since the municipality may have had no notice of the defect in the way.

The rule of Howland v. Vincent is not accepted in other jurisdictions. So far as we have ascertained, the cases, of which there is a considerable number, are all in opposition. The case has been cited in this Commonwealth about a dozen times, seldom, however, as the ground of the decision. Several of the cases point out that the law elsewhere is different. The latest discussion is in Lione v. Marr, 320 Mass. 17 (which should be read) where numerous cases are collected. That case follows Howland v. Vincent, but the Court cites many cases to the contrary and intimates that it follows Howland v. Vincent only because of the rule of *stare decisis*.

It appears, therefore, that there is in this Commonwealth, in cases which occasionally arise, a peculiar rule which is repudiated elsewhere, and which, in our opinion, produces unjust results.

Ordinarily, we do not think it good policy to enact legislation for the purpose of counteracting a particular decision of the Courts which does not establish some broad principle, but this seems an unusual instance. The recent decision in Leone v. Marr based on *stare decisis* would make it difficult now to overrule the old decision

in Howland v. Vincent and seems to leave us permanently with a defect in our law. In these circumstances we incline to favor legislation in the direction of the proposed bill.

But we think the wording of the bill is not entirely satisfactory. It might be held to apply on strictly private ways. The law applicable to persons coming upon private lands has been settled by a long course of decisions and ought not now to be interfered with to any greater extent than proposed by the draft act hereinafter recommended. In other respects the wording of section 368 of the American Law Institute's Restatement of Torts seems to us more accurate and preferable. The draft recomended below follows substantially the Institute's wording except that we have inserted the words "in tort" and the words "and property damage." We have also added the paragraph creating liability for death since such liability is wholly statutory and the Restatement does not formulate rules for it. See Restatement, section 925.

We therefore recommend the following:

DRAFT ACT

AN ACT TO IMPOSE LIABILITY UNDER CERTAIN CONDITIONS UPON A POSSESSOR OF LAND ADJACENT TO A PUBLIC WAY.

Chapter 84 of the General Laws as amended is hereby further amended by the addition of the following section:—

Section 27. A possessor of land who creates or maintains thereon an excavation or other artificial condition so near an existing public way that he realizes, or should realize, that it involves an unreasonable risk to others accidentally brought in contact therewith while traveling with reasonable care upon the public way shall be subject to liability in tort for bodily harm and property damage thereby caused to them.

If the harm causes death the possessor of the land shall be subject to liability for the death as for death caused by negligence, in accordance with the provisions of section two of Chapter 229 of the General Laws as amended by section one of Chapter 238 of the acts of 1958, and all provisions of said Chapter 229 as amended relative to death caused by negligence shall apply except those of section one of said Chapter 229 and except such as are specially applicable to common carriers of passengers, employers, or persons operating a railroad, street railway, or electric railroad.

An act of this kind would have the benefit of the comments included in the Restatement.

H. 1987 RELATIVE TO THE CREATION AND TERMINATION OF AGENCY AND OTHER FIDUCIARY POWERS IN TIME OF ATOMIC EMERGENCY

(Referred By Resolves Chapter 19)

This bill is a slightly revised form of a similar bill submitted to the legislature in 1957. The reason and purpose of the bill was explained in detail in a statement by its authors which was printed for the information of the bar in the Massachusetts Law Quarterly for March 1957. A redraft of this statement is reprinted for convenient reference in Appendix F of this report. The purpose of anticipating a possible atomic emergency in which the principal of a business or his agents in carrying on business or a fiduciary is killed so that under the present law the agency is terminated by the death of the principal and no one is left with authority to carry on or protect the business or the property of a fiduciary and providing so far as legally possible against the ruin or serious loss involved seems an obviously desirable purpose. The problem is as to the workable mechanics of a safe-guarding law.

We have studied the bill and believe it, with slight amendments, to be workable and practical and within the law. We, therefore, recommend it with a few minor changes, in the following form:

DRAFT ACT

(H. 1987 as Revised)

AN ACT RELATIVE TO THE CREATION AND TERMINATION OF AGENCY AND OTHER FIDUCIARY POWERS IN TIME OF ATOMIC EMERGENCY.

Chapter 104 of the General Laws, as amended, is hereby further amended by adding at the end thereof the following subtitle and sections:—

AGENCY AND OTHER FIDUCIARY POWERS IN TIME OF ATOMIC EMERGENCY.

Section 7. For the purposes of this subtitle, "atomic emergency" shall mean an emergency resulting from the occurrence of substantial harmful effects within one or more states of the United States or the District of Columbia due to the use against the United States of atomic weapons.

Section 8. During a period of atomic emergency, the power of any person to act for another as guardian or conservator or to exercise any authority or apparent authority as agent or subagent shall continue regardless of the death or loss of capacity during such period of any ward, principal or intermediate agent, until limited or terminated as provided in this section

and in section ten. Such authority and apparent authority of an agent or subagent shall be limited or terminated as to any agent, subagent or third person who acts with knowledge that the principal or intermediate agent has provided in writing or otherwise that such authority or apparent authority shall not continue as provided in this section or has otherwise limited or revoked such authority or apparent authority.

Section 9. A principal, trustee, executor, administrator, guardian or conservator by a power of attorney or other writing given by him or on his behalf may authorize another to exercise as his agent during a period of atomic emergency such of the powers of the grantor of the authority as may be enumerated therein regardless of the death or loss of capacity during such period of the grantor of the authority or the death of his ward during such period.

The powers so delegated by a trustee or other fiduciary may include powers which would be nondelegable in the absence of this statute, unless an instrument creating or controlling the trust or other fiduciary relationship expressly provides otherwise.

During a period of atomic emergency, the granted powers shall continue, regardless of the death or loss of capacity during such period of the grantor or the death of his ward during such period, until limited or terminated as to any agent or third person who acts with knowledge of any limitation or revocation thereof by the grantor in writing, or terminated as provided in section ten.

Section 10. The powers of any agent, subagent, conservator or guardian pursuant to sections eight and nine during a period of atomic emergency shall terminate as to any agent, subagent, conservator, guardian or third person who acts with knowledge of the appointment after the commencement of the atomic emergency of any public official or body or any trustee, executor, administrator, guardian or other personal representative, qualified and able to exercise the powers involved, or of the discharge of the agent, subagent, conservator or guardian by a court or other public official or body of competent jurisdiction.

The courts shall take judicial notice of the existence, extent and duration of an atomic emergency. The governor or any other person or body having the powers of the governor is authorized to proclaim the commencement of an atomic emergency for the purposes of this subtitle when in his opinion such emergency exists, and to proclaim the termination of an atomic emergency for the purposes of this subtitle when in his

opinion such emergency has terminated, and any such proclamation shall be conclusive with respect to any date subsequent to the date of the proclamation.

Except for the power referred to in paragraph *(f)* of section eleven, the power of an agent continuing after the death of his principal as provided in section eight or nine shall not authorize any intestate or testamentary distribution of the principal's estate.

Section 11. Authority given an agent by a power of attorney or other writing to exercise "statutory powers during an atomic emergency," unless otherwise limited, includes authority during such a period, regardless of the death or loss of capacity of the principal—

(a) To manage any business or investments entrusted to the agent's charge;

(b) To contract for the sale of, make a conveyance of, lease or deliver any property, rights, securities and causes of action entrusted to his charge, and to receive payment therefor;

(c) To contract for the purchase of, accept a conveyance of, lease or accept delivery of any property, rights, securities and causes of action required in connection with any interest of the principal committed to his charge, and to pay therefor;

(d) To employ and pay such assistants, and to discharge, appoint and pay such agents and subagents of the principal, as the proper performance of his duties requires;

(e) To collect all sums due to the principal from any source, and to pay all debts and taxes owed by the principal, in connection with any interest entrusted to his charge;

(f) To continue such provisions for the support of the dependents of the principal as the principal was accustomed to make and is unable to make on account of his death or loss of capacity or because of the atomic emergency; and

(g) To do what he reasonably believes to be necessary, with respect to the interests committed to his charge, in order to prevent substantial loss to the principal or to his estate resulting from the atomic emergency.

Section 12. The reasonable fees and expenses of an agent, subagent, conservator or guardian acting in good faith pursuant to sections eight and nine shall be a first charge upon any assets of the principal or ward or of the principal's or ward's estate in the hands of the agent, subagent, conservator or guardian. The transfer of any part of such assets by the agent, subagent,

conservator or guardian shall release the charge on the assets so transferred except as otherwise provided in the instrument of transfer.

Section 13. The provisions of the subtitle shall apply during a period of atomic emergency to powers, authority and apparent authority—

(a) Where the ward, guardian, conservator, principal, trustee, executor or administrator or one or more of the co-guardians, co-conservators, co-trustees, co-executors or co-administrators is domiciled in the commonwealth at the commencement of the atomic emergency; or

(b) Arising out of, or covering, any business transacted in the commonwealth or arising under any fiduciary administration if at the commencement of the atomic emergency the res is sited in the commonwealth or such administration is subject primarily to the jurisdiction of the commonwealth; or

(c) Created by a power of attorney or other writing given by or on behalf of a principal domiciled in the commonwealth at the time of the giving, or given in the commonwealth by or on behalf of any principal; or

(d) Created by a power of attorney declaring that it shall be governed by the laws of the commonwealth, where there is a reasonable relationship between the actions authorized thereby and the commonwealth; or

(e) To the further extent that they are, under applicable principles of the conflict of laws, governed by the laws (other than as to the conflict of laws) of the commonwealth.

Section 14. If any provision or application of this subtitle is held invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

H. 1662, AS TO NOTICES OF DEVISES AND LEGACIES

(Referred by Resolves, Chapter 9)

This bill is entitled:

AN ACT CLARIFYING THE REQUIREMENT FOR NOTICE BY EXECUTORS TO DEVISEES AND LEGATEES.

Section 12 of Chapter 192 of the General Laws is hereby amended by adding at the end thereof the following new sentence:—The mailing to devisees and legatees of the court notice or citation issued on the filing of the petition for probate of the will shall satisfy the requirement of this section for notifying

devisees and legatees that devises, legacies or bequests have been made to them, even though such notice or citation is mailed before the allowance of the will and the appointment and qualification of the executor.

We do not recommend the bill because it does not "clarify."

The Section 12 referred to now reads:

"Within three months after the allowance of a will and the appointment and qualification of an executor, it shall be the duty of the executor to notify by mail the devisees and legatees named in the will whose addresses are known to him that devises, legacies or bequests have been made to them and to file in the probate court an affidavit showing the names of those notified and the addresses to which notices were mailed. In case an administrator with the will annexed is appointed he shall have the same duty unless it has already been performed by an executor."

The purpose of H. 1662 is to avoid two notices. We approve of the purpose but suggest that the simplest and most effective way of accomplishing the purpose of notifying legatees and devisees that they are named in the will is by rule *or preferably by a revised form of citation*. The present form of citation is to "all persons interested" without saying how interested and without mentioning devises, legacies or bequests. The order of notice which is *not served with the citation* is to serve heirs "and all known legatees and devisees," but does not order notice to them that they *are* devisees or legatees. That was the reason for Section 12 as recommended by the Council in its 29th report, p. 15, in 1953. We suggest that the substance of the following sentence be inserted just before the last paragraph of the present form of citation:

REVISED CITATION

"By order of court you are notified as a person interested as an heir-at-law of the deceased or a legatee or devisee named in the instrument or instruments offered for probate. If you are not an heir-at-law you are interested because you are named in the will or codicil offered as a legatee or devisee."

If this is done there will be no need of a second notice under Section 12 or of filling up the registry with piles of affidavits.

Accordingly, we respectfully recommend such revision of the citation on a petition for probate to the probate judges and to the Administrative Committee of the Probate Courts under Sections 30 and 30A as amended of Chapter 215 of the General Laws.

H. 665, AN ACT REQUIRING "AT LEAST SEVEN DAYS'" NOTICE PRIOR TO THE ALLOWANCE OF A PETITION FOR ADVANCEMENTS TO WIDOWS

(Referred by Resolves, Chapter 11)

SECTION 1. Section 2 of Chapter 196 of the General Laws, as most recently amended by Chapter 214 of the Acts of 1936, is hereby further amended by inserting after the word "may," in line 3, the following:—, after at least seven days' notice to all parties interested.

We do not recommend the bill.

We are not aware of any abuses under the present law and we think the proposed requirement of notice might cause unnecessary delay and expense for the widow and children in small estates.

In connection with the subject matter of the section, however, we think it should be changed by striking out the word "one" and substituting the word "five," so that the permissible allowance for each child shall be "not exceeding five hundred dollars." The present amount of $100.00 was established in 1899 by Chapter 479, § 6. While as stated by the court in Patterson v. Fine, 287 Mass. 268, at pp. 271-2, "it should be of small amount" for temporary help, "so as not to be sensibly felt by others who are interested in . . . the estate," it does not fit living costs or the lowered value of the dollar today and should, in our opinion, be brought up to date.

We, therefore, recommend the following:

DRAFT ACT

Section 2 of Chapter 196 of the General Laws as most recently amended by Chapter 214 of the Acts of 1936 is hereby further amended by striking out the word "one" in the clause limiting the amount of allowance and substituting the word "five," so that the clause shall read, "not exceeding five hundred dollars to any child."

H. 191, AN ACT PERMITTING CERTAIN FIDUCIARIES TO ACT DURING THE APPEAL PERIOD

Chapter 215 of the General Laws is hereby amended by adding a new Section 24A as follows:

Section 24A. The acts of an executor, administrator, guardian, conservator or trustee performed after the entry of the decree appointing him in such capacity and prior to the expiration of the period allowed for an appeal therefrom shall be valid to the same extent as if said appeal period had expired without any appeal in all instances where there has been no appearance entered against such appointment prior to the entry of the decree or where such appearance has been entered and withdrawn prior to the entry of the decree.

This bill was called to our attention.

We see no objection to it and recommend its passage.

The filing of an appeal suspends the authority of a decree, but where there is no appearance or when an appearance is withdrawn before the decree there is no one to appeal unless some unknown person who claims to be "aggrieved" appears before the expiration of the twenty days. That is rare and is not a sufficient reason for leaving the estate unprotected during the twenty days when the estate may need some action for which the fiduciary is appointed.

THE ADMINISTRATIVE COMMITTEE OF THE PROBATE COURTS

Mr. Daly, the Executive Secretary to the Justices of the Supreme Judicial Court, in paragraph 60 of his second report, dated June 30, 1958 (Pub. Doc. 166), in speaking of the Probate Courts says:

> "Another year's experience convinces me more firmly that the Administrative Committee should have at least as much power as that of the District Courts."

We agree with Mr. Daly. The legislative history of the Administrative Committee began with the District Courts. In 1920, the Judicature Commission, in its final report (House Doc. 1205 of 1921) stated their belief "that there should be some body charged with the duty and given the power to investigate and make recommendations." They suggested a committee of judges (see p. 37) and provided for it (see p. 140) in the act subsequently passed in 1922 (Chapter 532). That committee of three (beginning with Judge Milliken of New Bedford, Judge MacDonald of Marlborough and Judge Hibbard of Pittsfield) operated as an advisory body so well for about 20 years with such helpful results that about 1941 it was reorganized as a committee of five judges with its administrative authority, the exercise of which is essential under changing conditions. Meanwhile, in its 6th report in 1930, the Judicial Council (pp. 12-13) suggested a similar committee for the Probate Courts, as follows:

RECOMMENDATION IN 6TH REPORT OF THE JUDICIAL COUNCIL IN 1930

> "There is complaint of a lack of uniformity in the practice of the probate courts in the different counties which causes delay and inconvenience to persons doing business in those courts.
>
> "The probate courts are county courts, each functioning independently of the others with little opportunity for comparison of its work with that of the others. Under such conditions it is unavoidable that differences in practice should arise that cause annoyance to persons attempting to do business in courts with which

they are not familiar and it may also happen that requirements are made in some counties that are regarded as unnecessary in others. Some means of bringing these courts into closer touch with each other is desirable.

"A somewhat similar situation existed in the district courts before the creation of the Administrative Committee of the District Courts and conditions in those courts have been greatly improved through the influence of that committee.

"We believe that such an administrative committee for the probate courts would be of benefit and we submit the following draft act.

"SECTION 1. Chapter two hundred and fifteen of the General Laws is hereby amended by inserting after section thirty the following new section:

Section 30A. There shall be an Administrative Committee of Probate Courts which shall consist of three judges of probate assigned to the performance of such duty by the Chief Justice of the Supreme Judicial Court for such period of time as the chief justice may deem advisable. The committee shall be authorized to visit any Probate Court, as a committee or by subcommittee, to recommend uniform practice and procedure and shall have general advisory powers. . . ."

The act thus submitted was adopted in 1931 as Section 30A of Chapter 215 of the General Laws. In 1956 the Judicial Survey Commission recommended that the Administrative Committee of the Probate Courts be given substantially the authority which the Administrative Committee of the District Courts has had for years under G.L. Chapter 218, Section 43, with great benefit to the District Courts, the bar and the public. The Commission in its report (House 2620 of 1956) said:

> An administrative committee of the probate courts was created in 1931 by General Laws, Chapter 215, Section 30A "to promote co-ordination in the work of such courts." But the committee was given no more than "general advisory powers.". . .
>
> We believe that we will not secure the best that we can expect from our fine organization of probate courts in this Commonwealth without the grant of supervisory power to the Administrative Committee of the probate courts and the Supreme Judicial Court.

The Commission recommended the following bill (see pp. 30-31):

BILL RECOMMENDED BY THE JUDICIAL SURVEY COMMISSION

AN ACT PROVIDING FOR INCREASED AUTHORITY FOR THE ADMINISTRATIVE COMMITTEE OF THE PROBATE COURTS.

Chapter 215 of the General Laws, as most recently amended by chapter 330 of the acts of 1934, is hereby further amended by striking out section 30A and inserting in place thereof the following section:—

Section 30A. There shall be an administrative committee of the probate courts, hereinafter called the com-

mittee, which shall consist of three judges thereof, assigned to service thereon by the chief justice of the supreme judicial court for such period of time as he may deem advisable. The committee shall be authorized to visit any probate court, as a committee or by subcommittee, to require uniform practice and procedure, to prescribe forms and records and the keeping thereof, *and shall have general powers of superintendence over all the probate courts, their registers, assistant registers and other officers and clerks, but except as otherwise provided by law, shall have no power to appoint any such officers. The committee may regulate the assignment of the probate judges in each county, the sessions and sittings of the judges, the time and places for holding such sessions and sittings, and* may require such records to be kept as may generally assist in the determination of the nature and volume and the time required to complete all the work of such probate courts. To promote co-ordination in the administration of the probate courts the committee may from time to time call conferences of any or all the judges thereof, or of other officials connected therewith, and the traveling expenses of such judges or officials for attending such conferences, and also the necessary expenses of the members of the committee incurred in the performance of their duties as aforesaid, shall, subject to the approval of the governor and council be paid from the state treasury. The committee shall from time to time establish forms for annual reports of the work of the several probate courts and registries of probate; and the several registries of probate shall annually, on or before October first, prepare and file with the committee uniform reports of the work of said courts and registries during the preceding court year.

This bill, *omitting* lines 14 to 21 (printed above in italics), was adopted by Chapter 644 of the Acts of 1956.

By Chapter 532 of 1956 the legislature also adopted, as recommended by the Survey Commission (see pp. 4-6), the following:

CHAPTER 532 OF 1956

ACT PROVIDING FOR ADMINISTRATION OF THE COURTS AND AN ADMINISTRATIVE OFFICE OF THE COURTS

SECTION 1. Section 3 of chapter 211 of the General Laws, as appearing in the Tercentenary Edition, is

hereby amended by adding at the end of said section the following paragraph:—

In addition to the foregoing, the supreme judicial court shall also have general superintendence and direction of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C of this chapter; *and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration.* Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

SECTION 2. Said chapter 211 is hereby further amended by inserting after section 3 the following sections:—

Section 3A. There shall be an administrative office of the courts with an administrator appointed by the supreme judicial court to serve at the pleasure thereof. . . .

Section 3C. The administrator, subject to the direction and supervision of the supreme judicial court, shall perform the following functions and shall make reports and recommendations to the supreme judicial court relative thereto:—

(*a*) Examination of the administrative methods, systems and activities of the judges, clerks, registers, recorders, stenographic reporters and employees of all courts of the commonwealth and the offices connected therewith. . . .

Section 3E. The administrator shall submit annually as of June thirtieth to the supreme judicial court a report of the activities of the administrative office of the courts together with his recommendations, which report shall be a matter of public record and shall be printed as a public document. . . .

In accordance with this act the Administrator, Mr. Daly, as Executive Secretary to the Court, has made the recommendation already quoted as to the Administrative Committee, with the following bill for the consideration of the justices of the Supreme Judicial Court and of the legislature.

APPENDIX IV, PUBLIC DOCUMENT 166

AN ACT RELATIVE TO THE POWERS AND DUTIES OF THE ADMINISTRATIVE COMMITTEE OF THE PROBATE COURTS.

Be it enacted, etc.

SECTION 1. Chapter 215 of the General Laws is hereby amended by striking out therefrom Section 30A as most recently amended by the Acts of 1956, Chapter 664, and by substituting therefor the following new Section 30A:

Section 30A. There shall be an administrative committee of the probate courts, hereinafter called the committee, which shall consist of three judges thereof, assigned to service thereon by the chief justice of the supreme judicial court for such period of time as he may deem advisable. The committee shall, subject to the general superintendence of the supreme judicial court provided for in section three of chapter two hundred and eleven of the General Laws have the following powers and duties:

(a) They shall be authorized to visit any probate court as a committee or by subcommittee;

(b) They shall have the power to require uniform practice and procedure;

(c) They shall have power to prescribe forms and records and the keeping thereof, and may require such records to be kept as may generally assist in the determination of the nature and volume and the time required to complete all the work of such probate courts;

(d) They shall regulate the assignment of judges in each county, including sittings by judges in counties other than their own, and no judge shall sit in any county other than his own without written approval of the committee, shall determine the number of simultaneous sessions for each county, and may fix the time and place of holding such simultaneous sessions;

(e) Without limiting any of the foregoing powers the committee shall have general superintendence over all the probate courts, their registers, assistant registers and other officers and clerks, but except as otherwise provided by law, shall have no power to appoint any such officers;

(f) They shall from time to time establish forms for annual reports of the work of the several probate courts and registries of probate; and the several registers of probate shall annually on or before October first prepare and file with the committee uniform reports of the work of the courts and registries during the next prior twelve-month period ending on June thirtieth.

To promote co-ordination in the administration of the probate courts the committee may from time to time call conferences of any or all the judges thereof, or of other officials connected therewith, and the traveling expenses of such judges or officials for attending such conferences, and also the necessary expenses of the members of the committee incurred in the performance of their duties as aforesaid, shall, subject to the approval of the governor and council, be paid from the state treasury.

SECTION 2. Chapter 217 of the General Laws is hereby amended by striking out therefrom Section 8 and by substituting therefor the following new Section 8:

Section 8. If a judge of probate is unable to perform his duties or any part

of them because of sickness, interest or other legal disqualification, or if, in his opinion and subject to the written approval of the administrative committee of the probate courts, his court requires the assistance of another judge or judges, a judge or judges assigned by the administrative committee shall perform in such court such duties of a judge of probate at such times and at such places as the committee shall approve and designate, and no judge of probate shall sit outside his county without such approval of the administrative committee. If there shall occur a vacancy in the office of judge of probate, and if there is no special judge empowered to act in the county and ready so to act, the administrative committee shall designate a judge to act and perform the duties of judge of probate during such vacancy. In the event of performance of duties by a judge of probate outside his county, unless objection is made by an interested party before the hearing begins, any case may be heard and determined outside the county involved by such designated judge, who may send his decree to the registry of probate for the county where the case is pending. Any judge of probate receiving a salary of five thousand dollars or more shall assist when so designated, and any judge of probate receiving a salary of less than five thousand dollars may assist when so designated.

SECTION 3. Chapter 217 of the General Laws is hereby further amended by inserting after Section 8 thereof the following Section 8A:

Section 8A. Two or more simultaneous sessions of a probate court may be held, subject to the regulation of and approval by the administrative committee of the probate courts, and the fact of holding such simultaneous sessions shall be so stated upon the record.

Comparison shows that the bill is substantially the same as the Survey Commission bill (with clauses added in (d) as to judges sitting in other counties). The Section 2 also deals with sittings in other counties by amending Section 3 of Chapter 217 and Section 3 deals with "simultaneous sessions," similar to the provisions of the *District* Court Committee.

We think that the extended functions proposed for the Administrative Committee should, as in the District Courts, be performed by a committee of probate judges subject to the general supervision of the Supreme Judicial Court. The proposal should not be misunderstood as an attack on our system of probate courts or their administration in general. Quite the contrary. Referring again to the report of the Survey Commission we call attention to the following appreciation (pp. 79-80):

In "surveying" our probate courts we have the benefit of some exhaustive work by others. In 1943 Prof. Thomas E. Atkinson, a national authority in the field, wrote a comprehensive article on "The Development of the Massachusetts Probate System" which he prefaced with: "According to present lights its [Massachusetts] law of administration, while not the most advanced, is certainly representative of the best in probate procedure" and concluded (at the end of thirty pages) with: "The Massachusetts probate court system rep-

resents the peculiarly American way of dealing with the judicial aspects of succession to property."

Also, in the early 1940's a committee was appointed under the auspices of the American Bar Association and the American Law Institute directed toward the formulation of a model probate code for submission to the various States. Professor Atkinson and a colleague of equal stature, Prof. Lewis M. Simes, headed this committee. They were assisted by prominent judges, lawyers, teachers and librarians, their labors bearing fruit in 1946 in the form of a "Model Probate Code" which has since been adopted by ten or more States. The Commission has examined this Code and commends it. At the same time, it unhesitatingly adheres to the basic stability and enduring concepts of our own probate administration, which so commanded the respect of the authors of the Model Probate Code as to merit the following comment in their prologue thereto:

> While the probate legislation of the states in which probate codes have been recently adopted has been generally helpful in this connection (making up a model probate code), statutes have also sometimes furnished valuable suggestions for the Model Code. This is particularly true in the case of Massachusetts, where excellent solutions of many problems were found in well-drafted statutes.
>
> Guy Newhall [who guides the bar with his books on probate law], in 1953, in a talk before the bar associations, later reduced to writing, said: "You should be thankful that you practice probate law in Massachusetts under a system which I believe to be the most simple and efficient in the world."

The trouble is not with the system but with the lack of any over-all study and supervising authority such as the Chief Justice of the Superior Court or the Administrative Committee of the District Courts, as pointed out by the Judicial Council in the passage quoted above from its 6th report when it recommended an Advisory Committee. It was because unfortunate conditions still continue, some of which are discussed by the Survey Commission (see pp. 82-86), that the Commission in 1956 and now the Executive Secretary of the Justices of the Supreme Judicial Court (in his first report, Pub. Doc. 166 of 1957, pp. 36-38, and again in his second report, this year) recommend some authority, not only for study but for businesslike action in the matter of administrative details in the interest of the clients and their legal advisors throughout the Commonwealth who are obliged to resort to these courts. In the administration of justice as in other practical affairs the modern world cannot afford unnecessary delay and expense.

We support Mr. Daly's bill to carry out the recommendation of the Survey Commission.

APPRAISERS

In the second and final report of the Judicature Commission in 1920 (House Doc. No. 1205 of 1921), at p. 90, that Commission discussed "Appraisements" as follows:

> "General Laws, Chapter 195, Section 6, requires that the property in the estate of every deceased person shall be appraised, . . . Property is usually appraised upon the appointment of trustees or other fiduciaries, but the court may dispense with an appraisement. These requirements were adopted by the legislature before the practice of an official appraisement for taxation purposes developed, and when there was less information in regard to values easily available.
>
> "But since the development of the state and federal practice in appraising property for taxation purposes, and the multitude of papers and necessary red tape in which the settlement of an estate is now involved, and since the value of property is in most cases readily ascertainable, this requirement for an additional appraisement has become not only unnecessary, but, to a very considerable extent, a perfunctory performance, causes unnecessary expense, and adds to the already excessive burden connected with the settlement of an estate. The valuations reported by these statutory appraisers are not accepted either by the state or federal officials without further investigation of their own. The fiduciary for his own information must ascertain values for the purpose of his inventory, and his statement of values subject to correction by the state authorities is all that is ordinarily necessary in this respect."

The proposal to eliminate the requirement of appraisements as an unnecessary and useless expense has been revived by Mr. Daly, Secretary to the Justices of the Supreme Judicial Court, in his second report of June 30, 1958 (Pub. Doc. 166, see paragraphs 68 and 69).

We agree with Mr. Daly and recommend the bill submitted by him in Appendix V in the following form:

DRAFT ACT

SECTION 1. Chapter 195 of the General Laws is hereby amended by adding at the end of Section 5 the following sentences:

"Such inventory shall include an estimate of value of each item by the executor or administrator. No appraiser shall be appointed," so that Section 5 shall read as follows:

Section 5. Every executor, except one who gives bond under section three of chapter two hundred and five, and every administrator shall, within three months after his appointment, make on oath and return to the probate court a true inventory of the real and personal property of the deceased which at the time of making such inventory has come to his possession or knowledge. Such inventory shall include an estimate of value of each item by the executor or administrator. *No appraiser shall be appointed.*

SECTION 2. Section six of chapter one hundred and ninety-five of the General Laws is hereby repealed.

SECTION 3. Chapter two hundred and three of the General Laws is hereby amended by striking out section nine thereof and by substituting the following new section nine:

Section 9. If an inventory is required to be returned by a trustee, the estate and effects shall be inventoried and an inventory thereof filed by the trustee in the same manner as provided for inventories by executors or administrators under section five of chapter one hundred and ninety-five.

SECTION 4. Chapter two hundred and one of the General Laws is hereby amended by striking out section forty-six thereof and inserting in place thereof the following new section forty-six:

Section 46. Upon taking an inventory, the estate and effects therein shall be inventoried and an inventory filed by such guardian or conservator as provided for inventories by executors or administrators under section five of chapter one hundred and ninety-five.

SECTION 5. Section forty-eight of chapter two hundred and fifteen of the General Laws is hereby repealed.

SUITS AGAINST UNINCORPORATED ASSOCIATIONS

A letter from a Massachusetts lawyer addressed to the Judicial Council called our attention to the fact that a client, who was a widow, claimed $500.00 on a contractual basis against an unincorporated association. He continued:

"In order to bring action I find that our Supreme Judicial Court stated in Maguire v. Reough et al, 238 Mass. 98, that it is necessary to join all the members (in my case over 4,000) as defendants and serve them all, since the suit must be at law.

"To comment on such a situation is needless."

In the Maguire Case in 1921 the court said (at p. 100):

"The chief ground on which the plaintiff asks the court of equity to take jurisidiction of this contract case is the alleged inadequacy of the legal remedy, because at law all the members of the labor union must be made parties defendant. But the remedy she seeks is a legal one for judgment and execution against the association for the death benefit of $300. We have merely a large number of persons alleged to be liable as partners for a single debt. If the plaintiff desires to hold each of them liable, there is nothing inequitable in requiring that each should have due notice and an opportunity to defend. If she is content to look to some of the members, they must supply her with the names of the others if they plead non-joinder. . . . Undoubtedly the necessity of joining all the members as defendants at law makes the expense of process greater than in equity, where a number of members may be made parties defendant as representatives of the class. Pickett v. Walsh, 192 Mass. 572, 590. But that does not constitute a subject for equity jurisdiction. She would be reimbursed in costs for the expense of service. In short the plaintiff's remedy at law is plain and adequate."

Theoretically, at common law "the plaintiff's remedy is plain and adequate." As a matter of common sense, there is no remedy at all for a claim of $300.00 or $500.00 if the claimant has to serve several thousand members at a cost much greater than the amount of the claim and the suggestion that "she would be reimbursed in costs for the expense of service" does not make it a remedy in fact as she would not get a nickel unless she won the case and she obviously cannot afford to begin the case.

On the other hand, as the court points out in the passage quoted, if there are grounds for a suit in equity as distinguished from a claim for a simple debt on which a suit at law may be brought, representative members of the association may be sued without serving all the other members, as the court said in Thorn v. Foy, 328 Mass. 337, at p. 338:

> "The individual defendants are the duly elected officers . . . who have, subject to the orders and directions of the Executive Committee and general membership . . . the management and control of its affairs. It was found that the members are too numerous to be sued individually and that the named defendants adequately represent the entire membership. Pickett v. Walsh, 192 Mass. 572, 589-590," and other cases. See also Donahue v. Kenny, 327 Mass. 409.

We do not think this obviously unjust situation should continue so that a representative of an association of several thousand members with a representative organization can incur a debt of $300.00 or $500.00 and then not only refuse to pay and dispute the claim but say to the claimant "there is nothing you can do about it because you cannot sue us without serving every member and you cannot afford to do that."

The legislature has recognized the need of providing for representative suits to some extent. Section 6 of G.L., Chapter 182, has for many years provided:

> "An association or trust may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees or by the duly authorized agents of such trustees or by any duly authorized officer of the association or trust, in performance of their respective duties under such written instruments or declarations of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient."

This section as provided in Section 1 of Chapter 182 applies to "a voluntary association *under a written instrument or declaration of trust, the beneficial interest under which is divided into trans-*

ferable certificates of participation or shares"; and Section 40 of Chapter 223 provides that:

"In an action against a voluntary association or trust described in section one of chapter one hundred and eighty-two, engaged in business in the Commonwealth, service may be made upon any trustee or like officer thereof (1916, 184; 1931, 426, Sec. 295)."

So far as service of process goes we think it only just that an association organized on a representative basis for the benefit of all its members should be subject to a suit at law and recovery *from the assets of the association* to prevent obvious discriminatory injustice such as that described in the letter received by the council above quoted. Accordingly we think the words used by the court in the passage quoted from Thorn v. Foy should be used in a statute and we recommend the following:

DRAFT ACT

Chapter 182 of the General Laws is hereby amended by inserting after Section 6 the following new

Section 6A. A voluntary unincorporated association, having elected officers, who have, subject to the orders and directions of an executive committee, or other governing body, and the general membership of the association, the management and control of its affairs, may sue and be sued at law, and service of process upon one of its duly elected officers shall be deemed sufficient service.

Recovery of damages in such a suit shall be limited to the funds of the association.

NOTE

The italicized words in the foregoing draft are the words of the court in the passage quoted above from the case of Thorn v. Foy, 328 Mass., at p. 338.

H. 1294, SERVICE OF CIVIL PROCESS BY CONSTABLES

The following bill has been called to the attention of the Council by the Secretary of the Massachusetts Constables Association, with the request for its consideration.

HOUSE No. 1294

AN ACT TO REGULATE THE SERVICE OF CIVIL PROCESS [BY CONSTABLES].

Section 92 of chapter 41 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by striking out, in lines 13 and 15, the word "three" and inserting in place thereof, in each instance, the word:—five, —so as to read as follows:—*Section 92.* A constable who has given bond to the town in a sum of not less than one thousand dollars, with sureties approved by the selectmen, conditioned for the faithful performance of his duties in the

service of all civil processes committed to him, and has filed the same, with the approval of the selectmen endorsed thereon, with the town clerk, may within his town serve any writ or other process in a personal action in which the damages are not laid at a greater sum than two hundred dollars, and in replevin in which the subject matter does not exceed in value two hundred dollars, and any writ or other process under chapter two hundred and thirty-nine. A constable who has filed such bond, in a sum of not less than three thousand dollars may, within his town, also serve any such writ or other process in which the damages are laid at a sum not exceeding *five* hundred dollars, and any process in replevin in which the subject matter does not exceed in value *five* hundred dollars.

The substance of this proposal has been repeatedly discussed. As it concerns not only the interest of constables but very directly the convenience and expense of litigants and their lawyers in the smaller cases in the courts we have considered it as follows.

The limit of a constable's authority to serve civil process has been $300.00 for 86 years, since Chapter 268 of the Acts of 1872. Before that the amount was still less. With the change in the value of the dollar, $500.00 today is less in value than $300.00 was in 1872. With the increase in population and consequent litigation involving $500.00 or less the added cost of service and travel and frequent delays when made by a deputy sheriff at a distance instead of a local constable who can do it just as well and more promptly, at less cost seems to us both an unnecessary burden on the litigants and a dilatory waste of time of their lawyers when costs of everything are increasing and wasted time becomes constantly more serious and expensive for the practising bar. We see no sufficient reason today for retaining the dollar limitation of 1872. We think the amount might well be raised to more than $500.00 which would in fact partially restore the actual 1872 limit in present values. We recommend the bill *as printed above* which will in fact merely restore to some extent the actual 1872 limit in present dollars which has gradually been reduced by economic conditions in the past 86 years.

H. 961, AS TO COMMITMENT FOR EXAMINATION OF CERTAIN PERSONS APPEARING BEFORE THE COURTS

(Referred by Resolves, Chapter 30)

Section 99 of G.L. Chapter 123 inserted by Chapter 153 of the Acts of 1918 now provides:

"Mental Condition of Persons Coming Before Courts, How Determined; Expenses.—In order to determine the mental condition of any person coming

before any court of the commonwealth, the presiding judge may, in his discretion, request the department to assign a member of the medical staff of a state hospital to make such examinations as he may deem necessary. No fee shall be paid for such examination, but the examining physician may be reimbursed for his reasonable traveling expenses."

H. 961 would add at the end of this section for the purpose of clarifying the procedure and protecting the "person" involved, a requirement of further examination after the preliminary examination ordered by the court, before further proceedings.

In Denny v. Denny, 8 Allen 311 (1864), the children of the libellant in a divorce case petitioned the court for appointment of a guardian ad litem of the libellant because of insanity. The court unanimously decided:

"We have no doubt as to the authority of this court, upon a representation made to us that the libellant in a libel for divorce is insane, take notice of such representation, and, in such manner as the court may deem proper, to make the necessary preliminary examination as to such fact. This power is one necessarily existing in the court, as well for the protection of the libellant as for the orderly and proper conducting of the suit.

"The attention of the court may properly be directed to an inquiry upon this subject by a third party not connected with the suit as one of the immediate parties thereto. The libellee may not choose to make a defence of this character, and may file no answer or suggestion raising any question of the sanity of the libellant. A question so vital to the proper exercise of the jurisdiction of the court over the parties may only be presented from other sources. It will be within the discretion of the court, acting with reference to the circumstances of each particular case, to decide whether it demands a preliminary inquiry as to the sanity of the libellant, with a view to secure the proper administration of justice and the rights of all parties, and if deemed necessary the court will direct what mode shall be adopted to ascertain the facts as to the alleged incapacity of the party. If such incapacity is established to the satisfaction of the court, they will appoint a guardian ad litem to conduct the case. In making such appointment, no person should be selected who may be adverse in feeling or interest to the libellant, but one who will faithfully protect her rights and interests in reference to the matter of the libel."

For other opinions see Welch v. Fox, 205 Mass. 113-114; Sullivan v. Judges of the Superior Court, 271 Mass. 435, at pp. 437-8; Buckingham v. Alden, 315 Mass. 383, at p. 389.

As doubt exists whether the court's authority goes beyond the question whether a guardian ad litem should be appointed in a pending suit, the purpose of H. 961 is to clarify the law and remove the doubt.

We recommend a revised draft as follows:

DRAFT ACT

AN ACT RELATIVE TO MENTAL EXAMINATION OF CERTAIN PERSONS APPEARING BEFORE THE COURTS.

Chapter 123 of the General Laws is hereby amended by adding to Section 99 thereof the following paragraphs:

If any such person is a party to any case, matter or proceeding then pending in said court, said presiding judge may, after hearing such evidence as he may consider sufficient, order such person to be detained, or if he has left the court, may issue a warrant for the apprehension and bringing before him and detention of such person, for such examination.

Upon such detention or apprehension, and pending further examination and hearing as herein provided, the court may make such order relative to his care, custody or confinement as it may see fit, including the designation of a state hospital wherein such person shall be examined as provided in this section.

Upon completion of such examination and tests as he may deem necessary by a member of the medical staff of any state hospital assigned by the department to make the examination, he shall report his findings to said presiding judge. No fee shall be paid for such examination, but the examining physician may be reimbursed for his travelling expenses.

If the examiner reports that in his opinion such person is not mentally ill, he shall be discharged, unless an application for commitment for such person has been received as provided in section fifty-one.

If the examiner reports that in his opinion such person is mentally ill, and if, further, there shall be filed with the court a certificate or certificates in accordance with the provisions of section fifty-one, certifying to the mental illness of such person by two properly qualified physicians, the presiding judge, whether or not he may be designated in section fifty, may then cause notice to be issued to such person and may hold a hearing or may refer the matter to another judge qualified to act designated by him. After such hearing an order may be made that such person be committed to an institution for the mentally ill, in accordance with the provisions of section fifty-one. Commitment proceedings shall thereupon continue as provided in sections fifty through fifty-five, and all other sections of this chapter relative to commitments of mentally ill persons.

Nothing in this section shall be construed to prevent the institution and prosecution of a separate proceeding under sections fifty-one through fifty-five. If such a separate proceeding is instituted the proceeding under this section shall be dismissed.

H. 2250, RELATIVE TO ADMISSIBILITY OF CONFESSIONS AND ADMISSIONS IN CRIMINAL TRIALS

(Referred by Resolves, Chapter 38)

This bill provides:

HOUSE No. 2250

AN ACT RELATIVE TO THE ADMISSIBILITY IN EVIDENCE OF CONFESSIONS AND ADMISSIONS IN CRIMINAL TRIALS.

Chapter 278 of the General Laws is hereby amended by inserting after section 11 the three following sections:—

Section 11A. No person shall be convicted of crime where proof of his guilt consists only of his extrajudicial admission or confession.

Section 11B. No confession shall be admissible in evidence unless the confessor was examined immediately before and immediately after the confession by an impartial physician to ascertain the mental and physical capacity and appearance of the confessor. Such impartial physician shall file his report in writing with the clerk of court under whose process the confessor shall first be held for trial.

Section 11C. A conviction shall not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offence; and the corroboration shall not be sufficient if it merely shows the commission of the offence or the circumstances thereof.

We do not recommend this bill.

We have received a copy of a memorandum submitted to the Judiciary Committee in support of the bill, reading as follows:

"In Massachusetts a confession is sufficient to warrant a conviction without corroborative or other evidence of guilt of the accused.

"This was settled beyond all question in C. v. Kimball, 321 Mass. 290, where it was said at pages 292 and 293: '[While] the general rule elsewhere in this country is that guilt cannot be established by the confession of the accused unsupported by corroborative evidence . . . that rule, however, does not obtain in this Commonwealth. . . "Even if the confession had been wholly without corroboration in the other evidence, the case would have been proper for the consideration of the jury."'

"A confession carries a prima facie inference that it is voluntary and an accused objecting to its admission as evidence has the burden to overcome such inference by a preponderance of evidence that it was made under such pressure of hope or fear as to raise a doubt of its authority. C. v. Buck, 265 Mass. 41, at p. 47.

"For excellent text and collection of cases as to 'Corroboration of extrajudicial confessions or admissions,' see 45 A.L.R. 2nd, 1316-1341. It appears in this material that Massachusetts and Wisconsin are the only two of the

48 states that fail to require corroboration of the facts constituting the corpus delicti in order to render the confession admissible (p. 1320). When we look around we find that Massachusetts is the only New England state that does not require corroboration and permits conviction solely on the statement of the accused made outside of court. All the Federal courts require corroboration. The last pronouncements by the U. S. Supreme Court are Opper v. U. S., 348 U. S. 84, and Smith v. U. S., 348 U. S. 147."

We are aware of the differences between the law of Massachusetts and the statement of law in opinions in other jurisidictions referred to in the passages quoted and in 45 A.L.R. 2nd, 1316-1341, but we think the reasoning in the leading Massachusetts opinions needs closer examination in considering such differences. We call attention to the statement of the court in the Kimball Case, 321 Mass., at pp. 292-3, that:

"the trend of modern decisions is in the direction of eliminating *quantitative* tests of the sufficiency of evidence."

Then, after a brief discussion with references the court sustains the Massachusetts rule and practice "as sound." Turning to the history in the background of that opinion we find the reasons stated by Mr. Justice James M. Morton in Com. v. Killion, 194 Mass. 153, at pp. 155-156, as follows: After summarizing the reasons for "corroboration" requirements in other directions the court said:

"But confessions and admissions when freely and voluntarily made have ever been regarded as amongst the most effectual proofs that can be furnished. There is no greater liability to misconstrue or misreport what has been said in a case where a person is accused of crime, than in many other cases where one person undertakes and is allowed to repeat what another has said.

"It is no doubt true that persons may be induced by fear or the hope of favor or other motives to make confessions which they otherwise would not have made. But confessions so obtained are rigorously excluded. In order for an extrajudicial confession to be admissible against the party making it, it must have been freely and voluntarily made. When so made it should stand like any other declaration made by a party to the cause, leaving the jury to judge from all the circumstances including the nature of the offense how much if any weight shall be given to it. In the somewhat analogous case of the admission of the evidence of accomplices no corroboration is required as matter of law (Commonwealth v. Bishop, 165 Mass. 148) in order to warrant the jury in convicting upon it, though such testimony is liable to be as untrustworthy, to say the least as evidence of an alleged confession."

This seems to us common sense, and in cases from other jurisdictions in which the courts repeat statements that "corroboration" is necessary, the court frequently seems to find "corroboration" in the circumstances of the confession or admission. This appears in the two opinions of the Supreme Court of the United States, Opper

v. U. S., 348 U. S. 84, and Smith v. U. S., 348 U. S. 147—cited in the memorandum above quoted. The finding of "corroboration" in the circumstances brings such cases closer to the Massachusetts law as stated and applied in the Killion Case and in the facts of Com. v. Kimball, 321 Mass. 290, than may appear from merely reading quoted sentences in opinions without examining the facts in the cases reported. For all these reasons we oppose the first section of H. 2250.

We oppose the second section because we find it difficult to see how a criminal case could be prepared and tried effectively in practice under the procedure therein described.

The third section of H. 2250 relates to the testimony of an accomplice who "turns states' evidence," as the common phrase is, and testifies for the government against the defendant. It has been commonly realized for generations that in many cases the only protection that the public may have against a clever offender is to persuade an accomplice or some independent offender to tell the story usually in the hope or expectation of protecting themselves and sometimes with an agreement of the District Attorney not to prosecute them or to secure leniency. Such arrangements were known and at times protected by the court, under the now forgotten common law of "Approvement" by which the witness was considered as acting meritoriously in doing his duty to the public by testifying and thus entitled to "equitable" protection. For a detailed account of the common law of "Approvement," see 2 Mass. Law Quarterly No. 6, August 1917, pp. 619-629.

The latest discussion of this matter appears in an extensive "Editorial Note" in the Brooklyn Law Review for April 1958 (Vol. 24, No. 2, pp. 324-343). It deals with the New York Statutory requirement in various classes of cases, points out the weakness of the requirement; points out the fact that a judicial confession by a plea of guilty requires no corroboration (see note 4, p. 324, and concludes, p. 343).

> "In view of the sharp criticism of the corroboration statutes by such eminent authorities as Professor John H. Wigmore, a noted criminologist as well as the renowned author of the classic work on evidence, and the adverse comments of such outstanding jurists as Judge Learned Hand, it is submitted that there is a need for a general legislative review of the New York corroboration statutes."
>
> "In 1937, the New York Commission on the Administration of Justice recommended to the New York legislature the repeal of the Statutory rule requiring corroboration of accomplices" on the ground "that it is a refuge of organized crime and protects the principals in racketeering cases."

The footnotes quote comments by Dean Wigmore and Judge

Hand and support the statement of our Massachusetts Court in the Kimball Case quoted as to the trend of opinion.

We are of the opinion that each of the three sections of H. 2250 would so hamstring the administration of the criminal law as to leave the public more helpless than it is now against the offenders in these difficult days.

H. 2250 is said to have been suggested by the unfortunate story of the recent Rodrigues Case in Springfield, results of which, when the error was discovered, were corrected, so far as practicable, by a pardon and recent legislative compensation (see Resolves, Chapter 56). But the occasional erroneous convictions which are bound to occur from time to time in an imperfect world among the thousands of cases tried, is not a sufficient reason for passing laws like those proposed in H. 2250.

H. 1292, TO PROVIDE JURORS IN ADVANCE OF SERVICE WITH A PAMPHLET OF INSTRUCTIONS ABOUT DUTY AS JURORS

(Referred by Resolves, Chapter 77).

This bill reads:

"HOUSE No. 1292

"AN ACT PROVIDING THAT PERSONS DRAWN FOR JURY DUTY BE FURNISHED WITH A PAMPHLET CONTAINING INSTRUCTIONS WHICH SHALL CONSTITUTE THE ONLY INDOCTRINATION OF SUCH PERSONS FOR DUTY AS JURORS.

"Section 24 of chapter 234 of the General Laws, as most recently amended by chapter 278 of the acts of 1956, is hereby further amended by adding at the end the following two sentences:—Each person so summoned shall, at the time of service of such venire, be furnished with a pamphlet containing instructions to jurors which shall be prepared by the chief justice of the superior court. Such pamphlet shall constitute the only indoctrination of a juror, and the court shall give no further instructions to a jury for the purpose of familiarizing jurors with their power, duties or obligations, except with respect to his charge in a specific case."

The petitioner has submitted the following suggestions in support of the bill.

"The bill provides that the new jury pool shall be instructed in its duties generally by a printed handbook rather than by instructions of individual judge. This is an important change, since considerable complaint has come to my attention from members of the bar that, within their personal experience, jury pools have been poisoned for a whole sitting by remarks made to the jurors prior to impanelling for any individual trial. Since trial attorneys in any one case, in all probability, are not aware of what has been said to the

jury by the judge prior to impanelling, they are in no position to take exceptions or to appeal from that portion of the remarks which may, in fact, be prejudicial to the rights of their clients.

"Indeed, it is not clear that any appeal could be taken even if the remarks to the judge and the new jury pool were clearly of a prejudicial nature, since such remarks are not part of the record of the trial. It appears that there have been sufficient abuses of this sort so that some remedy must be offered.

"In the Federal Courts the practise of providing a handbook for jurors is followed. I enclose a copy for your attention, with the suggestion that something very similar could be adopted for our State courts.

"It should be noted, of course, that the adoption of this statute in no way affects the right and practise of judges to charge juries in a case at bar."

We do not recommend the bill for the following reasons:

First, the handbook of the Federal Courts referred to is a pamphlet of 14 pages prepared some years ago by a committee of five Federal District Court judges for consideration of the Judicial Conference of the Chief Justice of the United States and the senior judges of the ten Federal Circuits published and distributed to Jurors by the Clerks of the United States District Courts by authorization of the National Conference until recently. Copies of this pamphlet were obtained for all members of the Judicial Council, but it appeared also that the authority to distribute the pamphlet was recently withdrawn as stated in the "Report of the Judicial Conference of the United States in September."

FROM REPORT OF JUDICIAL CONFERENCE OF THE UNITED STATES, SEPTEMBER 1957

Handbook for Petit Jurors

"The Committee called to the attention of the Conference the decision of the United States Court of Appeals for the Seventh Circuit in the case of United States v. Gordon, which held that the distribution of the Judicial Conference Handbook for Jurors in a criminal case was prejudicial and vitiated a conviction. The Committee reported that in the light of the criticism there expressed, it authorized the Administrative Office to notify all the clerks of district courts to withhold any further distribution of the handbook in question until further notice. The Committee has been informed that the United States has filed a petition asking for a rehearing by the court en banc, and that the defendant has filed a special plea and answer thereto. The Committee gave to the Conference a brief history of the handbook, but, since the matter is now pending in court, deemed it improper to discuss the merits of its use."

The opinion referred to was rendered by three of the circuit judges (including Judge Major, the retired Chief Judge who wrote the opinion). On the rehearing before the full court of five (Judge Major not sitting) the opinion was withdrawn by the majority

(the two who joined in it dissenting) and another opinion rendered (See U. S. v. Gordon, 253 Fed. 2nd 117, at pp. 184-194) on the ground that the question of prejudice could not be raised by a wholesale challenge based merely on the distribution of the handbook.

In addition to the decision, the majority of three in two opinions discussed the history and contents of the handbook in answer to the earlier opinion and approved the book as serving a useful purpose. The net result is that the circuit judges of the 7th Circuit were evenly divided as stated by one of the dissenters.

> "In view of the situation thus presented to us, it is unfortunate that Judge Major's opinion on the handbook issue is discarded and that the courts of the country will have to wait until the point is again raised in some future criminal trial which results in a conviction and an appeal. I feel that the net result is that the wholesome effect of an opinion is dissipated and the administration of justice is left suspended on the handbook issue until it comes before a court of review at another time. Thus time and expense are unnecessarily wasted."

No further authority has, as yet, been issued by the National Conference. Aside from other considerations, this existing uncertainty in the law is, in our opinion, a sufficient reason against handbook legislation at present. But we think there are other reasons, peculiarly applicable to the proposal in Massachusetts.

Second, the wholesale, general, mandatory, vague wording of H. 1292 for the future administration of justice, civil and criminal, is in our opinion against the public interest.

Third, while we are aware of the nationwide interest in regard to jurors' handbooks during a considerable period resulting from suggestions of the late Chief Justice Stone of the Supreme Court of the United States, we are also informed by the Chief Justice of our Superior Court that the matter has been considered by the judges repeatedly and, thus far, the preparation and use of such a handbook has been considered inadvisable as likely to create new problems of a kind suggested by the earlier opinion of the 7th Circuit in the Gordon Case, much of which is quoted in the two dissenting opinions on the rehearing referred to.

Fourth, our practice in Massachusetts differs materially in some respects from that in other jurisdictions, and we think the courts now have authority to frame and use a juror's handbook if in future a form better adapted to Massachusetts than any one we have yet seen, should be considered advisable.

Instructions by the court to grand-jurors on their assembling have been given from time to time since the beginning of our state government. A grand jury differs from a trial jury in that

its functions are limited to considering whether there is evidence to warrant an indictment for an offense to be tried later by a judge or by a judge and a trial jury. When it comes to a trial jury, then occasional preliminary talks by a judge to a "jury pool" before trials begin about jury duties appear, as stated by the petitioner, in the statement quoted at the beginning of this discussion, to cause comments just as the handbook in the 7th Federal Circuit in Illinois did in the Gordon Case. Whether a handbook about juror's duties can be drawn up for use in Massachusetts so carefully phrased as to help the administration of justice rather than complicate it is a debatable question, but, in our opinion, it would not be in the public interest to attempt to force the judgment of the court in the matter. For all these reasons we respectfully oppose legislation like H. 1292.

S. 389, AS TO RIGHTS IN WAYS

(Referred by Resolves, Chapter 5)

This is a bill:

SENATE No. 389

AN ACT TO PROVIDE FOR THE INCLUSION, UNLESS EXPRESSLY RESERVED OR EXCEPTED, OF ALL RIGHTS OF THE GRANTOR IN THAT PART OF ANY STREET, ROAD OR WAY IN ANY INSTANCE OF GRANT OR CONVEYANCE OF ABUTTING LAND.

SECTION 1. Chapter 183 of the General Laws is hereby amended by inserting after section 6, as appearing in the Tercentenary Edition, the following:—*Section 6A.* In any instrument of grant or conveyance, whether by way of deed, mortgage or otherwise, all the right, title and interest of the grantor in that part of any street, road or way, public or private, whether referred to in the instrument of grant or conveyance as street, road, way, or otherwise, which abuts the land granted or conveyed shall, notwithstanding any other provision of any general or special law and without the necessity of any words in the description or otherwise, be taken as included in the grant or conveyance, unless expressly reserved or excepted in such instrument.

SECTION 2. This act shall become effective on January first, nineteen hundred and fifty-nine.

We do not recommend the bill.

We think it would cause more trouble and confusion in the rules of construction of deeds and mortgages than it would cure (if anything).

In Casella v. Sneirson, 325 Mass. 85, at p. 89, the court said:

"Ordinarily a deed which bounds the premises 'on' or 'by' a way with no restricting or controlling words conveys title to the middle of the way" (cases cited including Erickson v. Ames, 264 Mass. 436, 442-445). "But the rule is otherwise where the deed describes the boundary as being 'on' or 'by' the side line of the way" (cases cited). These rules of construction were again applied in Olsen v. Arruda, 328 Mass. 363, *but they are simply rules of construction* which may be governed by the terms of the deed as applied to the land and a plan in the particular case. This appears in Chief Justice Rugg's opinion in Erickson v. Ames (above cited) in which he tells the story of the cases and quotes Chief Justice Knowlton to the same effect.

In Crocker's Notes on Common Forms, 7th ed., section 172, appears the following paragraph:

"In Gould v. Wagner, 196 Mass. 270, 82 N. E. 10, where the grantor owned no land on the other side of the way, it was held that notwithstanding this fact the deed carried title only to the center of the way. There was a strong dissenting opinion. There are many derelict parcels where the second half of a way has been left behind unconveyed and it is to be hoped that upon any special facts the court would follow the view of Holmes, J., in Crocker v. Cotting, 166 Mass. 183, 187, 44 N. E. 214, that this is merely a principle of interpretation so that manifest intention will override it. See also Gray v. Kelley, 194 Mass. 533, 537, 80 N. E. 651."

See also discussion of all kinds of varied language as to ways, rivers, the sea, etc.

To attempt to dominate "the manifest intention" of the parties by legislative words like those in Senate 389 would seem to cause all kinds of new troubles, especially in cases of development according to plans as applied to the land which are difficult enough as they are because of their variety. The only effective method of avoiding such troubles is more careful draftsmanship as applied to the facts of the premises involved. For these reasons we oppose the bill.

S. 386. RELATIVE TO GIFTS TO MINORS

(Referred by Resolves, Chapter 5)

This bill provides:

SENATE No. 386

AN ACT RELATIVE TO GIFTS TO MINORS.

SECTION 1. Section 1 (*i*) of chapter 724 of the acts of 1957 is amended by adding after "voting trust certificate" the words:—policies of life or endowment insurance or annuity contracts.

SECTION 2. Section 4 (*e*) of chapter 724 of the acts of 1957 is amended by adding at the end thereof the following:—Without limiting the generality

of the foregoing powers with respect to investments, the custodian may invest the income or principal of the custodial property in policies of life or endowment insurance or annuity contracts, issued by a life insurance company duly authorized to transact business in the commonwealth under chapter one hundred and seventy-five, on the life of the minor whose property he holds as custodian or on the life of a person in which life such minor has an insurable interest.

We do not recommend the bill.

The title of Chapter 201A inserted in the General Laws by Chapter 724 of the Acts of 1957 is "Uniform Gifts to Minors Act," the subject matter of which was referred to the Judicial Council in 1956. The purpose of the act as stated in our 32nd report (p. 32) "is to encourage small gifts to minors which, without such legislation, will not be made." The Council reported its opinion that the purpose "seems to us sound" and recommended the act for the reasons stated in the 32nd report with minor additions not affecting the substantial uniformity, as submitted by the National Conference of Commissioners on Uniform State Laws in 1956. As stated in #42, Massachusetts Law Quarterly, No. 3, October 1957, p. 26, the Uniform Act was also passed in 29 states and in Hawaii in 1957 in addition to the earlier passage of substantially similar acts in 11 states, the District of Columbia and Alaska. We think the broad investment section of the act adequate to fit the purpose of encouraging small gifts to minors without complicating it by inviting competition of insurance companies for such gifts. The insurance referred to in the bill does not fall within the purpose of the Uniform Act. The less the uniformity of a uniform act of this kind is disturbed the better. For these reasons we oppose S. 386.

H. 666, TO CLARIFY THE LAW RELATIVE TO DOWER AND CURTESY IN PROPERTY HELD IN JOINT TENANCY

(Referred by Resolves, Chapter 8)

HOUSE No. 666

AN ACT TO CLARIFY THE LAW RELATIVE TO DOWER AND CURTESY IN PROPERTY HELD IN JOINT TENANCY.

Chapter 189 of the General Laws is hereby amended by inserting after section 1A the following section:—

Section 1B. Property held by persons in joint tenancy shall not be subject to dower, curtesy or allowances to widows, heirs or next of kin, except when such property is held in the name of the last surviving joint tenant.

We do not recommend the bill because we think the law is clear now and does not need clarification.

A brief summary of the law in Massachusetts appears in the following opinion of the late Judge Davis in his volume of "Land Court Decisions."

"The property was part of a large tract held by two tenants in common who made a voluntary partition by deed, there being no release of dower on the part of the wife of the petitioner's co-tenant. She had no dower however. Potter v. Wheeler, 13 Mass. 504 (1816). Perhaps this case is so old that conveyancers are apt to overlook it. At all events the question has several times been raised by examiners and parties. Aside from Potter v. Wheeler, however, there would seem to be no doubt about the law. Dower is always subject to any incident which attaches to the husband's estate. Such an incident is the liability to partition, and 'there seems to be no good reason why a voluntary performance of an act to which a party in compellable by law should not have the same effect as if produced by compulsion.' Potter v. Wheeler, supra; Flynn v. Flynn, 171 Mass. 312.

"A somewhat similar question has been several times presented as to release of dower where there is a joint tenancy. Here again the only case in our reports is even older than Potter v. Wheeler and is to the effect that the wife of a joint tenant is entitled to her dower. Holbrook v. Finney, 4 Mass. 566 (1808). This case is well known for other matters covered by the decision, but the dictum as to dower under joint tenancy was confined to the peculiar tenancy which existed under the short lived statute of 1783 (chapter 52) abolishing the principle of survivorship among joint tenants, which was repealed by Chapter 62 of the Acts of 1785.

"Mr. Crocker merely expresses the opinion that 'it seems' that no release of dower is required in a deed from joint tenants. Notes on Common Forms, p. 141. The principle is perfectly plain, however, that to support dower the husband must have been seized and physically possessed of an inheritable estate capable of producing rents and profits. A life estate, an estate not vested in possession though vested in interest, an estate the possession of which is not definite and permanent either by reason of its physical or legal character, will not support dower. Trumbull v. Trumbull, 149 Mass. 200; Wilmarth v. Bridges, 113 Mass. 407; Conner v. Shepherd, 15 Mass. 164; Wooman v. Sartwell, 129 Mass. 210.

"The contingency of death is an incident of joint tenancy as to which the right of dower of the wife is subject equally with the estate of her husband upon which her right must be founded. The dower which the wife of the survivor may ultimately have, arises not through an estate in joint tenancy, but through an individual and definite estate of inheritance 'for that the joint tenant which surviveth claimeth the land by the feoffment, and by survivorshippe, which is above the title of dower.' Coke upon Littleton 37 b."

This opinion seems amply supported by the extended opinion of the Supreme Judicial Court in Flynn v. Flynn, 171 Mass. 312,

and by the opinion of the Supreme Court of the United States in 1841 in Mayburry v. Brien (15 Peters 21, at p. 37), as follows:

"We must consider the property as conveyed in joint tenancy; and the question arises, whether dower may be claimed in such an estate.

"Dower is a legal right, and whether it be claimed by suit at law, or in equity, the principle is the same.

"On a joint tenancy, at common law, dower does not attach. Coke on Litt. lib. 1, ch. 5, sec. 45. It is to be understood, that the wife shall not be endowed of lands or tenements, which her husband holdeth jointly with another at the time of his death; and the reason of this diversity is, for that the joint tenant, which surviveth, claimeth the land by the feoffment and by survivorship, which is above the title of dower, and may plead the feoffment made to himself, without naming of his companion that died.

"In 3 Kent's Com. 37, it is laid down, that the husband must have had seisin of the land in severalty at some time during the marriage, to entitle the wife to dower. No title to dower attaches on a joint seisin. The mere possibility of the estate being defeated by survivorship, prevents dower. The same principle is in 1 Roll. Abr. 676. Fitzh. N. B. 147. Park on Dower, 37. 3 Preston's Abstracts, 367.

"If the husband, being a joint tenant, convey his interest to another, and thus at once destroy the right of survivorship, and deprive himself of the property, his wife will not be entitled to dower. Burton on Real Property, 53. Co. Litt. 31b." Mayburry v. Brien, 15 Peters 21, at p. 37.

We think the law is clear and that it would be a mistake to cast doubt on it by an unnecessary statute such as H. 666.

All this is still further clarified by the recent advisory opinion of the justices (Senate 710 of 1958, reprinted in 43 M.L.Q., No. 3, Oct. 1958, relative to Senate Bill 388 of 1958, limiting dower to land held at the death).

H. 967, TO ALLOW A TENANCY BY THE ENTIRETY AS SECURITY FOR BAIL

(Referred by Resolves, Chapter 8)

This bill reads:

"Chapter 276 of the General Laws is hereby amended by striking out Section 57 as most recently amended by Section 33 of Chapter 319 of the Acts of 1953 and inserting in place thereof the following Section"

Examination of the section following shows that nothing is struck out but the present section of almost two pages is copied and re-enacted with the following new insertion in lines 29 to 32 "or makes offer of a part ownership to real property his title to which is on the basis of a tenancy by the entirety of a value equal to the amount of the bail required of him in such recognizance."

We do not recommend the bill.

Tenancy by the entirety is a special form of tenure possible only for a married couple for their mutual protection. It is governed by special rules. The joint ownership cannot be severed by either spouse. While the husband has the control and the right to the rents or other income during his life, his interest ceases at the moment of his death and the full title to the whole property is in the wife. If she dies first the husband gets the whole title in addition to his prior right to the rents, etc. But while both are alive each in technical legal language is "seised" of the whole and not merely of a part. In this respect it differs from a tenancy in common under which each person owns one part or a mere joint tenancy under which each can separate one part from the other by deed.

The purpose of security for bail is security. The foregoing description of tenancy by the entirety shows that if one of the married persons offered his or her interest as security, if he or she died one minute after the prisoner was released on bail there would be no security at all. An interest of such uncertainty does not seem to us either suitable security for bail or consistent with the married relation protected mutually by the nature of the tenure.

If both husband and wife join as bail so that the whole title is covered no statute is needed.

Accordingly, we do not recommend the bill.

HOUSE 610 TO EXCLUDE AS EVIDENCE ANYTHING IN A DEATH CERTIFICATE "RELEVANT TO THE ISSUE OF LIABILITY FOR CAUSING DEATH"

(Referred by Resolves, Chapter 63)

This bill was filed following the opinion in Kranz v. John Hancock Mutual Life Ins. Co., 335 Mass. 703, 710-711.

The bill reads:

Section 19 of chapter 46 of the General Laws, as most recently amended by chapter 366 of the acts of 1950, is hereby further amended by striking out the first sentence so that said section shall read as follows: — The record of the town clerk relative to a birth, marriage or death shall be prima facie evidence of the facts recorded, but nothing [contained in the record of a death which has reference to the question] *which would be relevant to the issue* of liability for causing the death shall be admissible

in [evidence] *any case*. A certificate of such a record, signed by the town clerk or assistant clerk, or a certificate of the copy of the record relative to a birth, marriage or death required to be kept in the state secretary's office, signed by said state secretary or one of his deputies, shall be admissible as evidence of such record. Upon request for an abbreviated record of a birth, marriage or death, the clerk or assistant clerk shall make an abstract of the record of the same without notation thereon of the name of the parent or parents, except by request of the applicant.

We do not recommend the bill.

The present Section 19 provides that "nothing contained in the record of a death *which has reference to the question of liability for causing the death* shall be admissible in evidence."

The underlined words are substantially similar to those in regard to hospital records inserted by Chapter 442, Section 2 of the acts of 1912 and now in G. L. Chapter 233, Section 79. The law as to records of city and town clerks was not thus limited. The history of the Statutes was told by the Judicial Council in its 20th report in 1944 (p. 41) and it was explained as to such a record "the result is that anything which a doctor, or a clerk, may insert in such a record of death has been held admissible although it would not be if inserted in a hospital record (see Dow v. U. S. Fidelity, etc. Co. 297 Mass. 34, Wolcott Exec. v. Summer 308 Mass. 413 and Caccomo's Case 1944 A. S. 771). We see no reason for any such difference and we believe the evidential use of death certificates should be subject to the same limitation as hospital records."

They then recommended the words in Section 19 which were inserted by C. 570 of 1945 as quoted above in italics.

In Leonard v. Boston El. Ry. 234 Mass. 480 at p. 482 the court said:

> "Under the present statute only such portions are admissible as relate to the treatment and medical history of the patient. The difficulty in applying the act arises from the nature of the entries made in hospital records. It frequently must happen that facts stated therein, which deal in the main with the patients medical history, may also be relevant to the issue of liability, in the event of litigation."

In that case the record contained "Odor of alcohol on breath."

In Cohen v. Boston Edison Co. 322 Mass. 239 the record contained the time of admission to the hospital.

H. 610 would apparently exclude such items but the words "relevant to the issue" in the bill would raise more questions than they would answer.

H. 1661, TO ALLOW PERSONS OTHER THAN ATTESTING WITNESSES TO TESTIFY AS TO THE SANITY OF A TESTATOR

(Referred by Resolves, Chapter 7)

This bill reads:

HOUSE No. 1661

AN ACT TO ALLOW PERSONS OTHER THAN ATTESTING WITNESSES TO TESTIFY AS TO THE SANITY OF A TESTATOR.

Chapter 233 of the General Laws, as amended, is further amended by the addition of the following section:—

Section 79H. In any proceeding in which the testamentary capacity of a testator is in issue, a witness, if he be otherwise qualified, and even though he is not an expert or an attesting witness to the will, shall be allowed to state his *inference or opinion* as to the mental condition of the testator with reference to sanity, or to other analogous facts material on an issue of capacity, provided such witness has had sufficient personal observation of the testator to *form a belief* as to his mental condition, and provided such witness shall specify the conduct of the testator observed by him, and provided such opinion is limited to the quality of the specific conduct or acts observed or to the witness' impression as a result of observing such conduct or acts, except that an attesting witness to a will may state such inference or opinion without regard to the above requirement of personal observation or to the limitation to specific acts or conduct.

We do not recommend the bill for the following reasons:

1st. The clause at the end in lines 15 to 18 beginning with the word "except" is unnecessary as it is law today in Massachusetts.

2nd. The words "inference or opinion" are used in lines 6 - 7 but are qualified by the words "to form a belief" in line 10. As will appear presently this reference to "belief" has been a source of misunderstanding and confusion for about 150 years.

3rd. The bill has many provisos full of so many qualifying words that it will complicate and confuse, what, except for varying and sometimes conflicting opinions, has always been a relatively simple matter if the case is properly prepared and the right questions are asked.

The cause of the uncertainties here and elsewhere appears to have started in Massachusetts. The story is briefly told in Wigmore on Evidence, 3rd Ed., Vol. VII, pp. 31-32, as follows:

WIGMORE ON EVIDENCE, 3RD ED., VOL. VII, SECTION 1933, PP. 31-32

1. *Sanity*

§ 1933. History of the Rule as to Laymen's Opinions. At common law in England there never had been any question that the opinions of lay-witnesses as to sanity or insanity could be received. Wherever a person presented himself as having had acquaintance with and therefore observation of a testator or an accused person whose sanity was in question, i.e., wherever the witness had the fundamental testimonial qualification of personal observation (ante, §§ 657, 689) no one thought of objecting on the score of the Opinion rule. This plainly appears in the long list of trials in which such testimony was received. Moreover, when the Opinion rule began to be discussed and formulated, in the last part of the 1700's and the early part of the 1800's, the judges and the treatise-writers constantly named this subject as one upon which lay opinions were always and unquestionably received.

In the United States, however, when the phrase "mere opinion" (i.e., opinion not resting on observed data) "is not evidence," came to be distorted into the phrase "opinion is not evidence" (ante, § 1917), one of the first subjects to come up for consideration was that of insanity. The ruling which lent most aid to the doubters (and probably the earliest excluding ruling) was that of Poole v. Richardson [3 Mass. 330]. This, however, was entirely misunderstood by those who relied on its authority. As in so many of the early rulings, the notion at the base of it was not the modern notion of opinion as "inference," but the old one of opinion as "belief having no observed data to support it" (ante, § 1917).

However, it served, whether rightly or wrongly understood, to raise the doubt. Speedily the doubt spread; and sooner or later every court had to face the objection based on the Opinion rule. Generally, the view favoring admission prevailed; the great law-making and argument-furnishing precedent for the earlier rulings being the opinion of Mr. Justice Gaston, in Clary v. Clary, in North Carolina, in 1841, and for the subsequent rulings, the opinions of Mr. Justice Doe, dissenting, in Boardman v. Woodman, in New Hampshire, in 1866, and of Mr. Justice Foster, in Hardy v. Merrill, in the same court, in 1875.

The opinion of Mr. Justice Doe succeeded in bringing about a change of heart in his own court, and is the arsenal of arguments to whose supplies it is chiefly due that the courts of the country are today so nearly unanimous in accepting the common-sense view of the subject. A judicial revolution also occurred in the decisions of the New York Court; and later years saw an effort in the Court of Massachusetts, the original home of the error, to retreat so far as might be from their early position.

Thereafter in section 1938 a detailed history is given of the cases in all the states a full account of the three stages of opinion as it developed from what is described as a somewhat "artificial" use and application of words to a more modern common-sense approach to reality. A reading of that rather extraordinary story of the fluctuating opinion in Massachusetts in the earlier days (still a source of confusion because support for almost any view can be found in some opinions in H. 1661) will throw us back into the complicated 2nd

stage of artificial opinion (described by Wigmore somewhat caustically in one place as "artificial nonsense").

The leading opinions containing the simpler modern rule, as pointed out by Wigmore in the passage above quoted, are those of Chief Justice Doe and Mr. Justice Foster of the New Hampshire Court. We believe the ultimate rule can be developed better by judicial decision than such a statute as H. 1661 which will make confusion worse confounded. We think the matter should be left to the courts and we oppose the bill. Compare Leach and McNaughton, Handbook of Massachusetts Evidence, 3rd Ed., 56-57.

H. 945, ENLARGING SCOPE OF JUDICIAL REVIEW UNDER WORKMEN'S COMPENSATION ACT

(Referred by Resolves, Chapter 12)

We do not recommend this bill, which provides:

AN ACT ENLARGING THE SCOPE OF JUDICIAL REVIEW UNDER THE WORKMEN'S COMPENSATION ACT.

The second sentence of section 11 of chapter 152 of the General Laws, as most recently amended, is hereby further amended by striking out said sentence and substituting in lieu thereof the following:—

The court shall thereupon render a decree in accordance therewith if supported by substantial evidence on the record as a whole and notify the parties. "Substantial evidence" means such evidence as a reasonable mind might accept as adequate to support a conclusion.

The present section 11 of G.L., C. 152, provides as amended:

§ 11. Powers of Superior Court.

Any party in interest may present certified copies of an order or decision of the reviewing board, a decision of a member from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the division, and all papers in connection therewith, to the superior court for the county in which the injury occurred or for the county of Suffolk, but if so presented to the court for the county of Suffolk, the court may, on motion of any party in interest, order the case removed to the court for the county in which the injury occurred. *The court shall thereupon render a decree in accordance therewith and notify the parties.*

Under this section, the court said many years ago:

"It is settled that the findings of fact by the Industrial Accident Board rest 'upon the same footing as the finding of a judge or a verdict of a jury,' and must stand if there is any evidence to support them." Pigeon's Case, 216 Mass. 51, 52. "The Superior Court has no authority to review the finding of the board and adopt that of the single member in preference to that of the board. Its only function is to determine as matter of law what kind of a decree

ought to be entered upon the decision made by the board." DiGiovanni's Case, 255 Mass. 241, 242, and cases cited.

(See Corbett's Case, 270 Mass. 162, at p. 164, and cases cited, and Whitaker's Case, 319 Mass. 582, at p. 583.)

H. 945 would change the law as thus stated by the court by striking out the sentence printed above in italics and reading, "The court shall thereupon render a decree in accordance therewith and notify the parties" and substituting the two sentences printed above in the proposed bill.

We do not recommend the bill. We think it would invite congestion by claims for review about "such evidence as a reasonable mind might accept as adequate to support a conclusion," whatever those words may mean. If the court considers that the findings reported by the board are not adequate findings on which the court can act it may recommit the matter to the board for additional findings, as was done in Corbett's Case, 270 Mass., at p. 163.

The 33rd report in 1957 (p. 37) quoted a statement of the court in Royal's Case, 286 Mass. 374, at p. 378, as to the nature and policy of the Compensation Act establishing a new legal status as a basis of liability without fault as an incident of industry to be enforced through a special procedure. In the 31st report in 1955 (p. 34) we pointed out that in addition an incidental purpose and result was reducing congestion in our courts by lifting thousands of accidents out of the courts. And in the 33rd report (p. 37) we said, "Various bills have been proposed in recent years which would seem to break down that policy by inconsistent whittling provisions to bring . . . industrial accidents back into the courts" in various ways.

The Commonwealth and its courts are struggling with the problem of congestion and, as stated on page 53 of the 33rd report, with the constant increase in the number of cars and accidents the pressure of litigation will continue. This outlook was discussed and emphasized by Judge Macauley in his address to the bar at the Lawyers Institute on June 14, 1958 (see 43 M.L.Q., July 1958).

On page 44 of the 33rd report we also called attention to the fact that motor vehicle tort cases accumulate "to such an extent as to threaten the stability and professional standing and experience of our most expensive tribunal of general jurisdiction and turning it into a motor vehicle court. This is not in our opinion a healthy tendency." To gradually put back industrial accidents in the courts by one whittling statute after another would largely increase this tendency.

For these reasons we oppose H. 945.

H. 1289, AUTHORIZING THE USE OF MEDICAL DEPOSITIONS AT TRIALS IN THE ABSENCE OF ATTENDING PHYSICIANS

(Referred by Resolves, Chapter 31)

Section *25* of Chapter 233 of the General Laws is hereby amended so as to read as follows:—*Section 25.* If a witness or party whose testimony is wanted in a civil cause or proceeding pending in the commonwealth lives more than thirty miles from the place of trial, or is about to go out of the commonwealth and not to return in time for the trial, *or is a physician who has treated or examined a party in a civil cause or proceeding involving personal injury,* or is so ill, aged or infirm as to make it probable that he will not be able to attend at the trial, his deposition may be taken.

We oppose this bill.

In our opinion doctors should be cross-examined orally before the jury and that leaving this to depositions on paper in all cases would open the door to all sorts of undesirable, unjust and at times even fraudulent practices which could "color" or otherwise prejudice a case for one side or another in ways which should not be encouraged by legislative permission.

If there is no dispute about the doctor's evidence parties can and do agree to it generally in smaller cases in which the medical evidence is relatively simple, but to admit paper medical evidence of all doctors in all cases without calling the doctor to the witness stand would seem, obviously, to reduce the chances of a fair trial.

H. 962 FOR ADJUDICATION OF RESTORATION OF SOUNDNESS OF MIND

(Referred by Resolves, Chapter 30)

This bill does not "strike out" the section referred to. It merely changes a few words such as "soundness of mind" and "mental illness" instead of words like "insane." Its purpose is to fit the practice and the terms used in the new probate form. The bill as filed with the new words printed in italics and with a few other words, also in italics, which we have added is recommended as follows:

DRAFT ACT

Chapter 123 of the General Laws is hereby amended by striking out section 94A, as most recently amended by chapter 535 of the acts of 1952, and inserting in place thereof the following section:—

Section 94A. Adjudication of Restoration of Soundness of Mind.—Any person adjudicated by any court to be a *mentally ill* person, whether or not in custody,

may petition for adjudication of his or her *recovery and competence*. The petition for such adjudication may be made by such person or by any parent, guardian, conservator, relative or friend of such person, and shall be filed in the probate court for the county in which the person resides, is confined, or in which the adjudication of mental illness was made. At any time prior to the hearing, the department of mental health shall be notified of such petition and may participate in the proceedings of the hearing. The department of mental health shall appoint two physicians certified by the American Board of Psychiatry and Neurology, Incorporated, to examine the subject and advise the court of his present mental condition. All reasonable expenses incurred in such examination and report shall be audited and paid as in the case of other court expenses, as provided for in section seventy-four. Notice of such petition shall be given to the husband or wife, if any, and to the guardian or conservator, if any, of such person, and the court may order notice to be given to all other persons who may be interested. If the court, after hearing, finds that such person is sane a decree to that effect shall be entered, and if in custody or on leave of absence or on visit, so called, such person shall forthwith be discharged. If the court finds that such person is still *mentally ill* it shall enter a decree to that effect and shall dismiss the petition, and no further petition for an adjudication of *recovery and competence* shall be filed by or in behalf of such person within one year of such dismissal.

SENATE 348, A BILL ENTITLED "AN ACT RELATING TO LIENS ON BUILDINGS AND LAND"

(Referred by Resolves, Chapter 13)

We do not recommend the bill and do not reprint it here because several revised drafts were submitted to us. Mr. Corwin representing the petitioners has submitted two revised drafts, one in April and the second in September with a statement of his reasons. Mr. Newman, representing material men, also submitted two drafts with his reasons and has filed his latest draft in the legislature as House 258. We print a brief statement of his reasons as submitted to the Council.

The Chairman and Secretary of the Council had a conference with Messrs. Corwin and Newman. Their attention was called to the report of the Special Commission of 1914 (House 1600 of 1915, which resulted in the present law that they wish to change) and to the 4th report of the Judicial Council, pp. 66-70, at the request of the legislature in 1928 on a bill relating particularly to materials. They were requested to examine those reports and submit any further suggestions which they might have. Thereafter, they submitted the drafts referred to.

We appreciate the problems of the petitioners and material men and their natural desire to extend the lien law. We also express

appreciation of their obvious care and effort in preparing their bills and explaining their reasons but we cannot recommend their proposed changes.

We have already emphasized in connection with other bills referred to us, the predominant, public interest in strengthening the recording system to carry out its original purpose of securing the marketability and mortgage ability of land instead of weakening it. We believe that the proposed changes would weaken it and would, therefore, be against the public interest. The report of the Special Commission of 1914 already mentioned is a very rare document today, seldom found except in libraries having bound sets of legislative documents. Copies of the full report (H. 1600 of 1915) were distributed at the time to all members of the Massachusetts Bar Association. The legislature in 1915 made certain changes in the act submitted by the Commission, but "as they did not work well in practice, the legislature decided to give the act, substantially as drawn by the commissioners, its test in practice" by Chapter 306 of 1916. For convenient permanent reference the full discussion relating to liens was reprinted in the first volume of the Massachusetts Law Quarterly (see No. 4, August, 1916 pp. 344-352). It contains a most thorough study of the history of the lien law and its practical relation to many aspects of life in the Commonwealth. After considering the proposed changes we think the substance of them and of the reasons in support of them are answered by that report which has been and is the basis of our present law. The Commission consisted of Hon. Charles T. Davis (a judge of the Land Court from its creation in 1898 until his death, while still active, in 1936), Francis M. Phelan and Samuel M. Child, both active and experienced practitioners in the field of real estate law. They approached the matter not only through advertised public hearings, but

> "through informal conference at such hearings with representatives of all of the different interests involved, to secure the point of view of each, as well as a general knowledge of the situation. To this end it has held hearings in Boston, Springfield, Pittsfield, Fall River and Worcester, at which it has heard representatives of different labor unions, of the Federation of Labor, of the real estate exchanges, the bar associations, textbook writers, the Master Builders Association, individual contractors and contractors' associations, men engaged in suburban development, men making a business of construction loans, material men, conveyancers, counsel and treasurers of co-operative banks, savings banks and trust companies. . . ."

While the full report deserves reading, we quote only a few extracts by way of illustration and call special attention to the fact that until the present law was adopted construction loans were not

obtainable in Suffolk County because they were too dangerous. Today, construction mortgages are essential to the increasing building needs of the community.

The following extracts, and especially the last one on "Public Records," when compared with the proposals indicate to some extent the basis for our judgment in opposition to these proposals.

EXTRACTS FROM REPORT OF SPECIAL COMMISSION ON LIENS, MORTGAGES AND TAX TITLES OF WHICH THE LATE JUDGE DAVIS WAS CHAIRMAN. HOUSE 1600 OF 1915. ON WHICH WERE BASED SECTIONS 2, 3 AND 4 OF ST. 1916, CHAPTER 306, NOW G.L. CHAPTER 254, SECTIONS 2, 3 AND 4 (SECTION 4 HAVING BEEN REVISED BY CHAPTER 265 OF 1918, PRIOR TO THE GENERAL LAWS OF 1920).

Contracts.—Mechanics' liens were originally created in Massachusetts by Chapter 156 of the Acts of 1819, entitled, "An Act securing to mechanics and others payment for their labor and materials expended in erecting and repairing houses and other buildings with their appurtenances."

Written.—This act expressly provided that, "such lien shall not attach unless the contract is made in writing and signed by the owner of the land or by someone duly authorized by him, and recorded in the registry of deeds for the county where the land lies."

Oral.—This situation continued until the passage of Chapter 343 of the Acts of 1851, which introduced the element of an oral contract of which there may be no record or notice in the registry of deeds. By Chapter 307 of the Acts of 1852 it was provided that such lien should not avail against any mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed.

Result.—This left the matter of priority dependent upon facts not of record; and the question of the existence of oral or written, of which no one can have knowledge except the parties thereto, has given rise to an immense amount of litigation to establish as a question of fact the matter of priority between the date of the contract and the recording of the mortgage.

Notice.—At present, in the metropolitan district at least, the lien is used largely for the benefit of fraudulent or irresponsible contractors. The material man does not have a lien unless he gives notice of his intention to claim one. The same provisions should extend to the contractor. It is not the policy of the law, and it was never the intention of the lien statute, that the property of one citizen should be made primarily liable for the indirect indebtedness of another. Where an owner builds his own house and makes his own contracts, his liability is direct, and there is no reason why his land should not be responsible for the value that is added to it to his own knowledge and in consequence of his own contracts. There is no reason, however, why a tract of land should be made liable for the indebtedness of persons with whom the owner and mortgagee have not only not had any direct relations, but of whose work and contracts it is impossible for them to have authoritative information.

Banks.—The lien at present attaches in consequence of contracts which may

precede the giving of a mortgage, or even the acquirement of title to the land. It is because it is impossible to tell whether liens actually exist or not, and if so for whose benefit, that banks will not loan money, and conveyancers will not pass title to land on which building operations exist. The result is an enormous loss to the community, not only because of the increased expense of construction loans, but because of the resultant decrease in the amount of building. In the country counties, where people know one another, there is no trouble. Banks in making loans rely largely upon the individuality of the owner and the contractor. In the metropolitan district this is not so, nor can it be so. There, titles are largely held, and legitimately held, in the names of straw men for the purpose of mortgage loans and building contracts. Land has lost its personality. The record title is the only thing that can be depended upon, and this, so far as liens are concerned, is of no protection because the existence of liens rests entirely upon matters of contract outside the record and not in any way ascertainable. For this reason banks are justified in refusing to make loans for construction purposes. The commission finds that in Suffolk County none of the savings banks and none of the trust companies will loan for building operations at all.

Public Records.—The whole tendency of the law in its every branch, as business methods have developed and become more complicated, has been toward the exclusion of oral contracts involving uncertainty, dispute and probable litigation, and in favor of written instruments and public notice by means of the public records. This is true of the law of evidence, of the law of contracts, and particularly of the law of real property. It underlies our entire recording system. The language of the preamble of the Provincial Statute of 1697, which provided that all deeds must be recorded, and that otherwise they should be invalid except only as against grantors and their heirs, is significant: "For the prevention of clandestine and uncertain sales of houses and lands, and to the intent that it may be better known what right, title or interest persons have in and to such estates as they shall offer to sale."

Some Reasons Submitted for Proposed Changes

In a letter submitted to the Council on April 16th, Mr. Corwin (representing the petitioners) summarized his purposes as follows:

"As you know, the Mechanics Lien Law has been in effect in Massachusetts for some time. It is rarely used because of its composition and because it has so little coverage. Our purpose is to extend the coverage to cover the following points:

"(1) To make the law applicable to all contracts of construction whether written or oral. It is well known in the construction industry that a great deal of construction is done on the basis of an oral agreement and there is no reason not to include oral agreements in the protection.

"(2) To make it applicable to all contracts whether or not there is a definite termination date. More than 75% of construction contracts do not contain a definite termination date. There is no reason why such a date is necessary just as long as a fixed date is established on the land records for the purposes of the lien.

"(3) To make it applicable to all labor and materials supplied under the particular contract, both before and after the lien is filed. As far as the owner at the time the contract is entered into is concerned, there is no reason why this cannot be done. There is a problem with respect to its application to owners securing a record title after the contract was entered into. This needs more study. [In his subsequent revised bill of September 11th he proposes to meet this problem by a proviso that "the lien would be valid" only to the extent of such labor or materials performed or furnished after the filing of "the notice of contract."]

"(4) To make the law applicable to material specially fabricated for a job although not delivered to the job. As you know, lumber dealers now pre-cut lumber for particular jobs and prefabrication is being used more and more in the construction industry. These prefabricators should have the right to a mechanics lien.

"(5) To make the writing of a notice to the owner prima facie evidence of receipt. More mechanics lien cases are lost because of the difficulty of showing actual service upon the owner. The burden should be transferred to the owner to show that the notice was not received."

In some respects the two revised drafts differ. Mr. Corwin would eliminate the requirement of a *written* contract as a basis for a lien. Mr. Newman would not. There are other differences particularly in Mr. Newman's extension of the lien to materials furnished within five days before the notice. Both would apply the lien to materials delivered but not incorporated in the structure or repair work. Both would loosen certain requirements as to notice and other details which they describe as "technicalities," etc., but those who object to a requirement on grounds of its "technicality" often have not bothered to do something in the correct and prescribed manner. The lien rules generally have a reason behind them and they can be complied with. Some of the complaints of "technicality" seem to be answered by the opinion of the Court in *Valentine Lumber Co.* v. *Thibeaut*, 333 Mass. 351 at pp. 356-7.

Mr. Newman also wishes to overrule the opinion of the Court in the case of *Valentine Lumber Co.* v. *Thibeaut* 1957 Advance Sheets, 1091 (336 Mass.). In that case suit was brought on March 27 but the subpoena was not recorded as required. On April 2 a bond was accepted by the Court and recorded on April 18th. The Court said:

"The failure to record the Subpoena was an omission to do something required in mandatory language by the statute, and there is nothing in the statute which excuses compliance with its provisions. Assuming that the bond does contain the same information that the Subpoena would, it is not a valid substitute. As we read the statute, there can be no substitute. Persons who rely on the recording system are entitled to rely on the documents required to be recorded. To hold that a document executed for one purpose gives notice of another and unrelated act would inject uncertainty into the recording

system. In order that the rights of owners and prospective purchasers may be fully protected, mechanics liens will be enforced only when there has been strict compliance with the statutory procedures." (See cases cited 1092-3.)

In our opinion the protection of those who rely on the recording act is of more importance to the building industry and the public than the minor convenience of those suppliers of materials who can, but do not, comply with the rules.

The Reference to Public Works

Chapter 682 of the acts of 1957 is referred to in support of some of the proposals on the ground that "the same principles" which apply to public work should apply to private work, but the so-called "principles" are not the same. There is no lien involved on public land and buildings, such liens are prohibited by Section 6 of Chapter 254. The "principle" of the recording act and of the rules to protect it are and should be controlling in the field of liens as in other directions discussed in this report.

The Uniform Commercial Code

There are also certain sections of the new uniform commercial code which would need careful study if any legislation were contemplated. As we do not recommend Senate 328 or either of the revised drafts submitted to us, we do not discuss the code provisions in detail.

As the Code became operative very recently, on October 1st, the new phraseology, particularly of Sections 9-310, 9-313, 314 and 316, and the various annotations in the annotated volume and other studies call for the closest study to ascertain their relation to and effect on the law of construction mortgages and agreements, on the law of liens especially for materials and on the recording act. Time has not permitted such a study but the need of it is an additional major objection to any legislation about liens such as those proposed.

There is, however, one exception which we think has merit.

Section 20 of G. L. Chapter 254

This section now provides:

"An interest in land sold under this Chapter may be redeemed, as provided for sales of land on execution."

Mr. Newman thinks this too great a burden on the lienor. He says:

"Consider what steps must first be taken before the lienor reaches this plateau. 1. A written contract; 2. Notice filed at the Registry of Deeds; 3.

Notice to the Owner; 4. A statement of account filed at the Registry of Deeds; 5. A Bill in Equity; 6. A trial; 7. A sale by the Sheriff, and then the lienor is asked to wait for one additional year before he can satisfy his lien. In one case it took five (5) years before the fruition of the lien. The proposed change would simply reduce the time now required to satisfy a lien which has been determined by the Court to be due and proper."

Mr. Newman's Section 6 of the bill filed by him as H. 258 of 1959 would amend Section 20 of Chapter 254 by striking it out and inserting the following:

Section 20. An interest in land sold under this Chapter shall forever foreclose the right of redemption.

While we oppose all the other proposed changes in the lien law, we see no objection to the substance of this change in Section 20, and therefore recommend the following:

DRAFT ACT

Section 20. There shall be no right to redeem land sold under this chapter.

H. 296, TO PROVIDE THAT THE COMMONWEALTH SHALL PAY ALL THE EXPENSES OF COURT OPERATIONS

(Referred by Resolves, Chapter 45)

This bill was prepared and introduced by Mr. John A. Daly, the Executive Secretary to the justices of the Supreme Judicial Court for reasons stated in his report of June 30, 1957 (printed as Public Document 166), pages 21-24, paragraphs 69-77. It is a carefully prepared bill of 170 sections (covering 70 pages) containing statutory changes needed to carry out its purpose.

Since the bill was referred to the Council and this report prepared Mr. Daly, in his second report (Pub. Doc. 166) dated June 30th, 1958, has renewed his proposal with a revised draft of various sections of the bill with the changes explained in carefully prepared notes. He also prepared a memorandum dealing with various aspects of the proposal and discussing anticipated objections. The substance of his reasons for the bill were stated in his first report in 1957 as follows (pp. 21-24):

"FINANCIAL COST OF OPERATING THE COURTS AND RECOMMENDATIONS

"69. The cost of running the courts is paid from three sources, the state, the city of Boston and the counties outside Suffolk. The erection or renting of court houses outside Boston and maintaining them is done by the counties.

In Suffolk County, with a peculiar exception in Chelsea, the city of Boston pays the expenses and the state makes a contribution toward the maintenance of the Pemberton Square court house. The provisions regulating these expenses are complicated and confusing. For example, the state pays the salaries of the probate judges and the registers and part of the clerical force, and gets all the income. But the counties buy the probate court supplies, pay a small part of the clerical salaries and provide the court rooms, getting practically nothing by way of income. The state pays the salaries of the superior court judges, but the counties pay the expenses for the offices of the clerks of court and get the income from fees and fines. All expenses of district courts are paid by the counties, but there is a complicated arrangement for reimbursing them for expenses incurred, when district court judges sit in the superior court and special judges are used in their courts.

"70. There is a special arrangement for the operation of the Pemberton Square court house. By Acts of 1935, chapter 474 and Acts of 1939, chapter 383, this building is under the charge of the Suffolk County Court House Commission. This has three members, one appointed by the governor, one by the chief justice of the supreme judicial court, and the sheriff ex officio. The city of Boston appropriates the money for its operation and the state contributes 30% of the maintenance cost. In the current year, this 30% will come to about $200,000. The cost of building the present north wing, usually called the new court house, was paid by the city through a bond issue, the last instalment on which falls due this year.

"71. Thus the court costs involve sixteen governmental bodies, namely, the state, the city of Boston, its subsidiary the Suffolk County Court House Commission, and the thirteen counties outside Suffolk. Space permits me only to touch on the bare essentials of this financial system. It is the result of a haphazard historical evolution with no logical justification whatsoever. It may be asked why one should be concerned with it since all the money comes out of the taxpayers anyway, but a consideration of the system of taxation shows that the subject does have a practical economic significance.

"72. The counties whose total payment is by far the largest do not levy taxes. Their costs are assessed on the cities and towns proportionately according to a formula established from time to time by statute. The municipalities rely for the bulk of their income on a direct property tax on real and personal property. (The latter produces insignificant amounts.) These governments cannot levy indirect taxes, unless small amounts from permits and licenses may be so considered. They can and do operate certain utilities in a proprietary capacity, but even the profits from the most flourishing enterprises may well be only a trifling fraction of all municipal costs. On the other hand the state while it does not levy a direct property tax has almost unlimited power to levy indirect taxes. It presently collects income taxes and corporation taxes and sales taxes on a few articles, and as this report is being written the legislature has before it a highly controversial bill to widen very much the sales tax. It is thus apparent that the cost of operating the courts in Boston and the counties ultimately falls on the owners of real estate. It is common knowledge that the cities and towns, particularly Boston, are in hard financial straits, and that taxation on real estate has nearly reached the saturation point. In addition to throwing most of the burden on real estate the present system is

inequitable in other ways. The treatment of Boston is grossly unfair. It is the core of a larger metropolitan area; its population is steadily declining, whereas the outer suburbs are steadily increasing. As this city not only has the state capital, but the largest concentration of banks, commercial houses, insurance companies, lawyers and public utility headquarters, it is not surprising that in all classes of court business the percentage done in Boston is larger than its percentage of the population. In all probability more equity cases will be heard in Boston than in the rest of the state put together. Even with the present system of annual sittings in several of the other counties some 90% of the arguments before the Full Bench of the supreme judicial court will be heard in Boston; nearly 40% of all writs in actions at law will be brought in Suffolk County. Boston with something less than one-sixth of the population pays substantially more than one-sixth of the court costs and carries on much more than one-sixth of all court business. It may be said that Boston benefits from the concentration of business, and in turn it can be argued that the whole state benefits from the economic activity of its largest city. These arguments could be pursued indefinitely. Thus there exists a conflict of interest between Boston and the rest of the state. So far as I am aware Boston has never been given any concession, except the 30% contribution by the state for the maintenance of the Suffolk County court house. The existence of this allowance is at least an acknowledgment that this court is to a substantial extent a state-wide institution.

"73. The time has come to recognize without exception that the administration of justice throughout the entire state is the direct concern of the state as a whole, and that all court expenses should be borne by the state and all income received by it. In order to carry this out, there will have to be extensive revisions of a number of statutes, and outright repeal of others. . . . My opinion is that this change is good and is long overdue. It has been reached independently of any bills before this session of the legislature.

"74. I further recommend the change because it will make only one financial body with which the courts will have to deal. It should simplify the matter of accounting, purchasing and maintenance. . . .

"76. This proposal is controversial. It uproots a time-honored system. It reduces advantages now held by some segments of the people over others, and by all other municipalities over the city of Boston. It transfers authority and patronage from the counties to the state. I am not innocent enough to believe that this reform will be adopted at once, but I am sure it will ultimately be put into effect. A situation which is inequitable, unrealistic and cumbersome cannot endure forever.

"77. This office has made a computation, see Appendix II, of present actual cost based on figures available in state, county and Boston reports and records. So far as I know this is the first time such determination has been attempted and it involves the gathering and correlation of statistics from a number of different sources. With respect to the state it covers the fiscal year ending June 30, 1956, and for Boston and the counties the calendar year 1956. . . ."

As he states, "this proposal is controversial," but he obviously expects that changing economic conditions and increasing litigation and its burdens of administration and increasing costs much of

which is imposed by the legislature on the county treasuries and thus indirectly on some of the taxpayers at the expense of others, will gradually bring the proposal to the front as a practical business measure to avoid unnecessary expense and inequitable distribution of the costs of the judicial system. He has, therefore, thought out and submitted a carefully prepared bill so that a thoughtful plan of the mechanics of the proposal will be available for study when conditions develop in such a way as to make the time ripe for consideration of a more businesslike arrangement of the judicial system than we have today.

We are not prepared to say that he may not be right, and we agree that, however unpopular it may appear to be, it seems time for the public officials of the Commonwealth and the counties, the bar, and the taxpaying public to think about the various aspects of the proposal.

Discussion

This is not the first time that something of the kind has been suggested. In 1957 a bill was referred to the Council to provide:

"That the entire Judicial system be placed under the Jurisdiction of the Commonwealth.

"Notwithstanding any provision of law to the contrary the entire judicial system of the Commonwealth, including justices, employees, land, buildings, salaries, costs, retirement systems and pensions, and all incidentals thereto, are hereby placed in the care, control and operation and maintenance of the Commonwealth."

In our 33rd report (p. 21) we said of this bill:

"Aside from its wholesale generality, the bill, as drawn, has no definite meaning because the Commonwealth has always had complete 'jurisdiction' of the entire judicial system in all its parts under the Constitution. The proposal indicates therefore, a belief of the petitioner that too much authority in regard to courts has been delegated to the counties. There has been an increasing tendency in that direction ever since 1915 which was discussed by the Council in earlier reports and we think that attention should be called to the substance of those discussions, in view of the revival from time to time of the tendency to increase county control of the judicial system.

"In its 7th report in 1931, after quoting the suggestion of a Special Commission that the local 'appropriating authority which assumes the responsibility of raising and spending the people's money *should be supreme*' (see p. 20) the Council pointed out that:

"'Ever since 1780 the constitution has contained the provision that "the general court shall forever have full power and authority to erect and constitute judicatories and courts." This means that the administration of justice in all its branches is a primary responsibility of the Commonwealth and not of the counties. The fact that some of the judges and officers of some courts are paid by the counties is merely an historical accident which

cannot shift the responsibility of the legislature, and it needs no argument to show that a vital part in setting up a "court or judicatory" consists in giving it the means to live and function as an independent tribunal of justice which it is the constitutional duty of the legislature to provide.

" 'The fact that has been forgotten in all these business arrangements for the distribution of financial control to the counties, is that the judges and the other officers of courts are not county servants, although they may be paid by the counties by direction of the legislature (cf. Com. v. Hawkes, 123 Mass. at p. 529; Morse v. Boston, 170 Mass. 555; Hibbard v. Suffolk, 163 Mass. 34).

" 'We trust that it is not necessary for us to explain that we are speaking of measures and not of men; that we are considering the tendencies of such measures on the administration of justice during generations, regardless of any temporary political organization of the various local county governments.'

"The contents of this report was again referred to by the Judicial Council in its 15th report (pp. 36-38) in 1939 and the Council then added:

" 'In these tax conscious days, we believe that the warning against county supremacy of the administration of justice, contained in the passages quoted above from council reports, should be borne constantly in mind.'

"It is for this reason that we have quoted the passages from the 7th report as the time may come when they will need further consideration."

Since then the appearance of Mr. Daly's bill indicates that the time *has* come for such consideration in connection with his proposal, and when it is so considered we think the discussion in the 7th and 15th reports of the Council, referred to above, should be carefully read. In explaining dangers of too much county control of the administration of justice, the Council said in the 7th report (in addition to what is quoted above):

"To the Massachusetts traditions of avoidance of reciprocal political relations between the local courts and local politics has been due, in no small measure, our escape from some of the consequences of a closer relation which have vexed communities in other states and discredited some courts in public opinion. But the momentum of the practice of such avoidance cannot last indefinitely unless it is protected in statutory arrangements which reflect the constitutional policy of Massachusetts, stated and explained in the 29th article of the Bill of Rights, of a judiciary 'as free, impartial and independent as the lot of humanity will admit.' The history of local politics in the various American states and its relation to the courts in some of them, illustrates, sufficiently, that the considerations, which we have stated, are not merely theoretical, but are practical illustrations of the meaning of the sentences in the 29th article of the Bill of Rights. That article sets and explains the standard of American justice and has furnished a recognized background for the constructive thinking of the country in regard to its judicial arrangements.

"We also suggest that it is worth consideration whether the whole chance of the danger which we have described might not be more effectively and permanently eradicated by making the entire judicial cost state-borne with a reassessment of a just part upon the several counties."

Two years later, in 1933, the subject came to the surface again and was again discussed in the 9th report (pp. 36-38) and, thereafter, in 1939 in the 15th report already referred to, with quotation from the 7th report. It will be apparent from these reports that the practical conditions and considerations therein discussed point in the direction of more adequate state control of the primary constitutional state function of administering justice in the counties throughout the state. Whether so complete a change as proposed in the opening sections of H. 296 is advisable we are not, at present, prepared to say. Perhaps, the suggestion of the Council, already quoted of "making the entire judicial cost state-borne with a reassessment of a just part upon the several counties," might be a provocative and healthy starting point for the discussion.

The Cost Involved

As already stated, Mr. Daly computed the cost of administering all the courts in 1956, county by county, in Appendix II of his report (pp. 62-73), ending with the following summary on p. 73:

APPENDIX II (P. 73)

Summary of Costs of Administering and Operating All Courts in the Commonwealth of Massachusetts

(By State and County for 1956)

	Net	*Gross*
Commonwealth of Massachusetts	$2,100,704.97	$2,768,537.06
Barnstable	122,420.61	151,528.20
Berkshire	178,680.09	245,591.22
Bristol	587,593.31	702,578.04
Dukes County	29,198.46	30,851.66
Essex	766,693.12	903,892.01
Franklin	91,977.00	106,394.80
Hampden	559,984.47	698,167.24
Hampshire	127,685.55	149,693.90
Middlesex	1,878,330.64	2,155,074.44
Nantucket	17,751.65	17,751.65
Norfolk	658,210.51	777,145.50
Plymouth	429,424.35	490,403.95
Suffolk	4,367,334.23	5,183,791.30
Worcester	939,174.48	1,104,632.06
	$12,855,163.44	$15,486,033.03
*Commitments	348,410.12	
Net Cost After Allowances	$13,203,573.58	

* A portion of the expense attendant to commitments is a proper court expense but to determine the actual judicial cost would require an examination of each and every voucher submitted for payment to the county treasurers in connection with commitments.

In the various county summaries is an item of Superior Court expenses "including auditors' Masters and referees." While the cost of jurors for attendance and travel is included in the total cost to the counties, there is no special reference to them. We refer to that cost as it relates to a recommendation of the Council in previous reports. That cost, as computed by the Judicial Council in its 25th report, pp. 16-17, amounted in 1948 to $630,138.90, with jurors' compensation at $6.00 a day and travel. This was increased in 1949 by the legislature to $8.00, amounting to a total increase of approximately $210,046.00, bringing the total cost of jurors to almost $1,000,000.00. Since then, jurors have been raised to $10.00, bringing the total to approximately $1,200,000.00 annually. These increases imposed on the taxpayers by the legislature through the county treasuries was, and is, one of the reasons why the Council has repeatedly suggested a moderate jury fee as a reasonable contribution to the rising cost. With the support of county treasurers such a bill was supported some years ago by both the Judiciary Committee and the Committee on Counties, but failed of passage. The imposition of such a $200,000.00 item, increased salaries, etc., on the various county treasuries instead of the state budget, without any contributing revenue, results, as Mr. Daly suggests, in what seems an inequitable distribution of the load to the taxpayers in *some* counties as well as to the total cost.

H. 1963, TO PROVIDE THAT CHARITABLE CORPORATIONS SHALL BE LIABLE IN TORT

(Referred by Resolves, Chapter 15)

This bill reads:

HOUSE No. 1963

AN ACT TO MAKE CHARITABLE CORPORATIONS LIABLE FOR THE TORTIOUS ACTS OF THEIR EMPLOYEES WHILE IN THE PERFORMANCE OF THEIR DUTIES TO THE CORPORATIONS WHICH SERVICES THE CORPORATIONS WERE PAID.

Notwithstanding the law to the contrary, charitable corporations shall be legally liable for the tortious acts of their agents and servants while in the performance and within the scope of their duties; provided, that the corporations derive profit from the services being rendered by their agents or servants.

We do not recommend its passage.

In McDonald v. Mass. Gen. Hospital, 120 Mass. 432, in 1876, it was decided in Massachusetts that "the funds of a public hospital are devoted to a charitable trust and that to subject them to the

payment of a judgment for negligence of its servants would be an unlawful diversion of the trust."

As stated by Chief Justice Rugg in Rosen v. Peter Bent Brigham Hospital, 235 Mass. 66, at p. 69, "that is the ground upon which that decision rests" and after an extended discussion of the cases that decision was followed and it has been followed ever since, see Kidd v. Massachusetts Homoeopathic Hospital, 237 Mass. 500. Foley v. Wesson Memorial Hospital, 246 Mass. 363. Young v. Worcester, 253 Mass. 481. Glaser v. Congregation Kehillath Israel, 263 Mass. 435. Bearse v. New England Deaconess Hospital, 321 Mass. 750.

There have been differences of opinion in other jurisdictions generally by divided courts, the most recent being in New Jersey in two cases, in one of which a church and in the other a hospital were held liable, the 5 to 2 majority deliberately changing the "common law" of New Jersey, but there were vigorous dissents in both cases. (See Dalton v. St. Luke's Catholic Church, N. J. Advance Sheets, 1958, June 6, pp. 22-28, and Collopy v. Newark Eye and Ear Infirmary, pp. 29-67.)

The legislature can change the law on the subject for the future but in our opinion it would be a mistaken policy to do so. In a world that is constantly becoming more dangerous our charitable institutions and the charitable impulse to support them by gifts become constantly more important. To discourage the charitable impulse to give for the benefit of the whole community by creating what is called "vicarious liability" and diverting such gifts from their general charitable purpose to the increasing uncertainty and cost of the litigious spirit would in our opinion have serious results for the Commonwealth.

The bill, H. 1963, contains a proviso that the corporations derive profit from services rendered "but any payments received are not 'profit.'" They simply become parts of the funds needed to operate the charity.

While this report was in the press the Massachusetts rule was reaffirmed by the court in Simpson v. Truesdale Hospital, Inc., decided on November 28, 1958, in a rescript (1958 Advance Sheets 1279). The court was asked to overrule the McDonald case. After referring in the rescript to the criticism and adverse decisions in other states and discussion by text writers, the court said:

> "While as an original proposition the doctrine might not commend itself to us today, it has been firmly imbedded in our law for over three quarters of a century and we think that its termination should be at legislative, rather than at judicial hands."

It should be noted that the court does not say that it *should* be "terminated." It merely suggests that it is a question of legislative policy.

We are aware that the rule of immunity has been attacked and ridiculed in some opinions and textbooks. The opinions are collected in Harper and James on "Torts," Vol. II, pp. 1667-1675. (See also Prosser on Torts, referred to in the rescript.) It is stated that "there is not the slightest indication that donations are discouraged or charities crippled in states which deny immunity."* That seems to us no more than a guess. Nowhere have we seen any discussion of the future effect on charities of the increasing danger of living stimulated by our car-minded population and all kinds of modern mechanical dangers which we have discussed in this report in connection with penalties. Of course, there are tragedies; of course the charitable impulse will survive, although it may be weakened. The problem is what effect will the struggle for existence, a possible depression, the impact of taxes in a spending era, the increasing casualties in an increasing and careless population, etc. have on the *possibility* of charitable people to give and the tendency toward what is called "socialized" medicine and surgery and hospital care taken over by the state. Assuming the tragedies, should charities be crippled by damages to a relatively few people while the possibilities of caring for a great many more for whom the gifts are made is weakened? It is for the legislature to consider all the various factors relating not only to hospitals but to churches and other charities which may provide new reasons for retaining the Massachusetts law today. Most charities, we believe, are operated at a loss which has to be made up by gifts. That is a reason for "community fund drives." Two or three, or even one large verdict might seriously threaten the existence of a charity. For all these reasons we oppose the bill.

IMPROPERLY REGISTERED MOTOR VEHICLES

By Resolves, Chapter 52 of 1957, the Council was requested to consider and report on the law relative to the operation of improperly registered cars. Accordingly, we discussed it at length in the 33rd report in that year (pp. 13-17).

We referred to the rule that the owner or operator of an unregistered or improperly registered car is a "trespasser" on the highway and cannot recover for injury or death in the absence of wanton, wilful or reckless conduct on the part of the defendant. We then continued:

*Harper and James, Vol. II, 1670.

"The rule originated in the case of Dudley v. Northampton Street Railway, 202 Mass. 443, decided in 1909 at a time when motor vehicles were still widely regarded with disapproval and before they had become a generally accepted means of conveyance both for business and pleasure. In the case of Koonovsky v. Quellette, 226 Mass. 474, decided in 1917, the court took a further and corollary step by holding that since the unregistered vehicle was wrongfully on the way and was therefore a nuisance, the creator of the nuisance was liable for all injury directly caused by it, whether he was negligent or not. . . . The heart of both rules is the proposition of the Dudley case that the owner or operator of an unregistered or improperly registered vehicle is a 'trespasser' and the vehicle a 'nuisance' on the highway.

"No general principle of law requires this conclusion.

"Many judges concerned with the practical application of the law have expressed the opinion that the rules of 'trespasser' and 'nuisance' are harsh and do injustice. . . . In several instances the Supreme Judicial Court has intimated its dislike of the rule of the Dudley case. The latest instance is found in the rescript opinion in Comeau v. Harrington in November, 1955, 333 Mass. 768. Here the court comes close to saying that it would not follow the 'trespasser' and 'nuisance' rules if the matter were a new one."

The court said:

" 'The plaintiffs urge us to overrule the doctrine first enunciated by this court in Dudley v. Northampton Street Railway, 202 Mass. 443. See Dean v. Leonard, 323 Mass. 606, 609. The doctrine has been called "unique." 62 Harv. L. Rev. 525. It has been very generally criticised. See, for example, Prosser, Torts (2d ed.) 162; cases collected in notes in 16 A.L.R. 1108, 54 A.L.R. 374, and 163 A.L.R. 1375. As an original proposition, it could hardly find favor with us today. The rule, however, has stood for more than forty-six years without repeal by the Legislature. Some of us would prefer to overrule the Dudley case, but the majority of the court think that its termination should be at legislative, rather than at judicial, hands. Bursey's Case, 325 Mass. 702, 706-707.'

"It seems to us common sense that civil liability for damages should be determined primarily with regard to what occurred on the highway rather than with regard to what was done or omitted in the registry office.

"In preparing the following draft act we have considered the approach employed in Chapter 89, Section 10, first enacted by Chapter 57 of the Acts of 1930, by which it was provided in substance that the rule of the Dudley case should not apply to violation of a one way street regulation. See Widronak v. Lord, 269 Mass. 238; Scranton v. Crosby, 298 Mass. 15."

We recommended a draft act which was passed by the House, recommitted to the Judiciary Committee by the Senate and referred to the next session. For the reasons summarized above and more fully stated in the 33rd report (pp. 13-17) we again recommend the following draft act which was passed by the House.

DRAFT ACT

H. 2817 of 1958

AN ACT PROVIDING THAT THE FAILURE TO REGISTER OR THE IMPROPER REGISTRATION OF A MOTOR VEHICLE SHALL NOT BE DEEMED TO RENDER THE VEHICLE A NUISANCE OR TO RENDER ANY PERSON A TRESPASSER UPON A WAY.

Section 9 of Chapter 90 of the General Laws as most recently amended by Chapter 85 of the Acts of 1956 is hereby further amended by striking out the third sentence and inserting in place thereof the following sentence:

"Violation of this section shall not be deemed to render the vehicle a nuisance or any person a trespasser upon a way and shall not constitute a defense to, or prevent a recovery in, an action of tort for injuries suffered by a person, or for the death of a person, or for damage to property, unless such violation by the person injured or killed or sustaining the damage was in fact a proximate cause of such injury, death or damage, but violation of this section shall be deemed evidence of negligence on the part of the violator."

LAND TAKINGS

In our 33rd report, after discussion of the bills contained in the report of the Commission on Eminent Domain which were referred to the Council, we stated (on p. 72):

"We think the first fair, and we believe effective, experiment is to provide for a mandatory, formal, reasonable offer within a reasonable time (we suggest six months) after the taking is filed in the Registry of Deeds, and a mandatory *pro tanto* payment of the amount of the offer in order to stop interest on that amount, thus protecting taxpayers, and to enable the land owner, whose life, business and financial condition, may be seriously interferred with, to get *some* payment with reasonable promptness without waiving his claim for more, if he wishes to submit his claim to a judge or jury."

We submitted a draft act (pp. 73-74).
We renew that recommendation.

DRAFT ACT

Section 39 of Chapter 79 of the General Laws as amended by Chapter 242 of the Acts of 1955, is hereby amended by striking out the second sentence thereof and substituting therefor the following:—

Such body politic or corporate, may and, after the right to such damages has become vested, shall make in writing a formal offer of a reasonable amount which it is willing to pay in settlement, with interest thereon, together with taxable costs if a petition for the assessment of such damages is pending, and notify the person entitled to receive the same by registered mail that he may collect it forthwith, as a payment pro tanto; the notice of such offer shall explain that such offer may be accepted and the amount collected without waiver or surrender of the right to claim a larger sum by proceeding before an appropriate tribunal. The offer and notice shall also explain, as provided in this section, the liability of the petitioner to repay with interest the amount if any of such *pro tanto* payment in excess of the damages awarded by such appropriate tribunal.

STATISTICAL INFORMATION AS TO THE BUSINESS OF THE VARIOUS COURTS

Chapter 707 of 1956 created the office of Executive Secretary to the Supreme Judicial Court and provided that the statistics of business should be collected by him. Such information, therefore, will appear in his report (Public Document No. 166), and to avoid expense of printing will not be duplicated in this report, with one exception. The Administrative Committee of the District Courts issues annual circular letters to the justices, clerks and probation officers of the 72 District Courts (other than the Municipal Court of the City of Boston). The substance of these letters have generally been reprinted as an appendix to our reports. The circular of July 1st, 1957 was reprinted in the Massachusetts Law Quarterly for July, 1957 for the information of the bar as to the directives of the Committee under the "full time" judges act of 1956 (C. 738). In view of the constant discussions of these courts we reprint, in Appendix A, the five year comparative table of business and the comments of the Committee on the work of these courts in order that their business and the work of the Committee may be more generally understood. The table of business of each court will appear in Mr. Daly's report.

FREDERIC J. MULDOON, *Chairman*

STANLEY E. QUA	JOHN C. LEGGAT	CHARLES W. BARTLETT
REUBEN L. LURIE	ELIJAH ADLOW	LIVINGSTON HALL
JOHN E. FENTON	KENNETH L. NASH	

INDEX OF THE REPORTS AND LIST OF 198 STATUTES PASSED AFTER RECOMMENDATION OF THE JUDICATURE COMMISSION AND THE JUDICIAL COUNCIL—1919-1958

For the convenience of the legislature and the courts and practising lawyers we call attention to the fact that annexed to the 27th report was an index to the contents of these reports since 1919, with an introductory statement and an annotated list of about 150 statutes passed after recommendation of the Judicature Commission and of the Judicial Council since 1919, *with references to the reports where the reasons for each statute may be found.* This list of statutes brought down to 1954 numbered 177 with references was reprinted for reference in the Massachusetts Law Quarterly for February 1955, Vol. 40, No. 1. References to five more statutes passed in 1955 appear on p. 5 of the 31st report, five more in 1956 on p. 6 of the 32nd report, four more on pp. 4-5 of the 33rd report, and seven more in 1958 on p. 6 of this report, bringing the total up to 198.

The various reports also contain the reasons for all negative reports on bills referred to the Council with request for report.

APPENDIX A

ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

December 1, 1958

To the Justices, Clerks and Probation Officers of the District Courts:

Together with this letter is enclosed the statistical report of the work of the District Courts for the period from July 1, 1957 through June 30, 1958. The five year comparable figures are:

	1953-4	1954-5	1955-6	1956-7	1957-8
Civil Writs Entered	57,109	63,798	73,868	75,993	79,817
Tried		8,732	8,170	7,957	7,701
Contract	31,016	32,132	35,642	36,686	39,170
Tried		2,355	2,253	2,399	2,328
Motor Vehicle Tort	14,612	20,104	26,276	27,630	28,114
Tried		2,259	2,150	2,077	2,044
Other Tort	2,226	2,095	2,233	2,153	2,336
Tried		305	328	291	279
Summary Process (Ejectment)	8,476	8,072	8,542	8,326	8,950
Tried		3,578	3,229	2,971	2,795
All Other Cases	779	1,395	1,175	1,177	1,223
Tried		235	210	230	255
Removals to Superior Court	3,998	9,248	13,569	14,409	16,100
Removal of Motor Vehicle Torts to Superior Court	2,599	7,756	11,965	12,921	14,358
Rep. to Appellate Div.	86	92	99	97	87
Appealed to Supreme Judicial Court	6	11	13	15	25
Supplementary Process	20,013	20,927	21,953	24,251	24,713
Small Claims	73,182	70,877	68,153	68,546	68,281
Criminal Cases Begun	202,334	202,126	201,730	223,760	236,519
Criminal Appeals	3,713	4,057	3,940	4,038	3,959
Drunkenness	53,100	52,917	51,517	52,673	52,975
Automobile Cases (Total)	103,825	103,374	104,784	119,162	126,953
Operating under Inf. Int. Liquor	5,566	5,767	5,948	6,351	6,062
Intoxicating Liquor Cases	315	257	231	309	316
Juvenile Cases Under 17 Years	6,676	6,934	8,169	9,204	10,235
Drunkenness Releases	26,885	26,066	24,886	26,060	25,836
Net Number Brought Before Court	26,215	26,901	26,631	26,790	27,078
Neglected Children	593	547	700	733	553
Inquests	39	38	26	27	33
Parking Tickets Returned	582,131	641,021	751,606	817,488	865,912
Number of Insane Commitments	5,761	5,763	5,745	5,880	5,680

Uniform Reciprocal Enforcement of Support, Chapter 273A

	1955-6	1956-7	1957-8
No. of Cases Initiated	840	826	977
No. of Cases Received (Other States)	351	345	396
Amount of Money Collected	$318,407.29	$601,370.86	$822,162.75

In the comparative analysis of these figures with certain pertinent data from other years the order of treatment and language used quite generally follows the pattern of the reports more recently made.

There were nearly four thousand more civil entries this year than last. Of this number roughly twenty-five hundred were contract cases. The number of entries is the greatest shown in any year since 1937-1938 when the total reached 82,715. 28,114 motor vehicle tort cases were entered and 14,358 were removed, leaving 13,756. In 1937-1938, however, 31,588 motor vehicle tort cases were entered and 13,076 were removed making the number remaining for disposition 18,512, a greater proportion percentage-wise than the reports of the later years indicate. Contract entries numbered 3,484 more than last year and is the largest number since these reports have been made. Cases tried were 7,701, a decrease of actual trials of 256. Perhaps the decrease indicated during the past few years may have some relation to the effort being made to reduce the Superior Court lists, thus causing lawyers because of the time element to reach settlement in their less important cases pending in the district courts. This decrease from a percentage of 13.54% in 1956 and 12.92% in 1957 to 12.09% this year will doubtless be reversed as a result of the passage of Chapter 369 of the Acts of 1958—the so-called "Remand or Transfer Bill." As previously set forth the number of actual trials is greatly augmented by the small claims cases of 68,281, supplementary process of 24,713 and summary process of 8,950 and the proportion of these cases that are tried is large. Small claims cases showed a scant reduction in number but summary process cases were up 7.40% to 8,950. There were 87 cases reported to the respective Appellate Divisions and of these but 25 were appealed to the Supreme Judicial Court.

The number of criminal cases continues its upward trend reaching the figure of 236,519 which again establishes a record high number during the thirty-four years these statistics have been prepared. The number of appeals taken—3,959—shows no comparative increase, in fact marks a percentage reduction from 1.8% of a year ago to 1.67%. The number of those arrested for drunkenness shows no substantial variation during the five year period set forth above and this is likewise true of the number who have been so arrested but have been released without being compelled to make an appearance in court. The number of those charged with operating while under the influence of intoxicating liquor shows a gratifying decrease of nearly 300, marking a reversal of the steady upward trend. This reduction is greater on a percentage basis when one considers the constantly increasing number of operators on our highways. Automobile cases before the courts continued to grow. This year there were 126,953 as compared with 119,162 a year ago, repeating its general upward course by 7,791. Intoxicating liquor cases, that is, the selling of liquor illegally, keeping and exposing for sale, etc., were up over a year ago by 7, but was greater than the last prior five year average of 260 by 56 or 21.6%.

Despite all the efforts that have been made and the helpful methods employed in dealing with juveniles the number before our courts shows an alarming figure. Last year we pointed out an increase of roughly one thousand cases over the preceding year from 8,169 to 9,204. This year the figure is 10,235. This is again an increase of over a thousand and shows the percentage-wise increase of over 25% in two years. We know of the many efforts being made in dealing with this

problem, but constant intelligent application has not been able to control it. We urge an organized community interest in addition to the continued labors already active in this field. We point this out as a distinctive problem that must be solved.

The number of cases of neglected children fell to the lowest figure in a number of years to 533. There was a greater number of inquests than last year 27 to 33. The number of insane commitments remained fairly constant being 200 less than last year totalling 5,680. Worcester again had the greatest number of commitments, 1,103, closely followed by Westboro with 1,072. Salem had 411, Wrentham 324, Gardner 281, Northampton 256, Springfield 220 and Dedham 213. It may be well to repeat our statement of last year. "Many of these commitments are made after hearings have been held at the hospitals, and most result in prolonged judicial commitments. The judges have to travel some distance in many of these cases in going to the hospitals. Consideration is given in these instances by providing such courts with extra simultaneous sessions because of this work."

Parking tickets returned continued their upward trend from 817,488 to 865,912. The clerical work on this item is tremendous.

During the three complete reportable years that the district courts have administered the Uniform Reciprocal Enforcement of Support Act, General Laws (Ter. Ed.) Chapter 273A, a total of $1,741,940.90 has been collected. In dealing with 1,191 cases $318,407.29 was collected in the year ending 1956; $601,370.86 was collected in 1957 when 1,171 new cases were handled; and this year when an additional 1,373 cases were dealt with a total of $822,162.75 was secured. None of the collections made by the district courts in non-support or neglect of family cases, which would run these figures well over a million dollars collected this year are included in these totals collected solely under the Uniform Reciprocal Enforcement of Support Act.

These figures demonstrate strikingly the amount of business that the district courts deal with each year and the great diversity of its work. As we have previously pointed out perhaps 25% of our population deals annually with the district courts. Certainly that percentage of our adult population does. All civil entries add to 191,761, and if multiplied by two to include both plaintiff and defendant aggregate 383,522; 236,519 criminal cases and 865,912 parking tickets total 1,485,953. We do not include in the above total 10,265 juvenile cases and 5,680 insane commitments, nor do we include witnesses in any case, nor the law enforcement officers and various agencies that are directly concerned with the business of the courts. We believe the district courts are performing their judicial duties with excellent efficiency.

The circular continues with references to recent statutes and cases, forms for use under the recent "Transfer Act" and discussion of "Compulsory Hospitalization of Recalcitrant Tuberculosis Patients," under Chapter 615 of 1956.

APPENDIX B

Statement in Support of H. 1487, Submitted to the Judicial Council by Hon. John J. Connelly, Presiding Justice, Boston Juvenile Court

The following are the reasons why House Bill No. 1487 was filed by the sponsors:

Prior to the amendments to General Laws, Chapter 119 by Chapter 646 of the Acts of 1954 children who were alleged to be neglected by their parents could have their case decided upon by a court of the Commonwealth almost immediately, so that if it was found by the court that the children were neglected they would receive the needed care and protection under the procedure of law, and all their rights and the rights of the parents, as well as the state, which has by law an interest in such cases, would be immediately and completely protected. Importantly, if they were found not neglected the children would be restored to their parents and their home immediately. Further, if the children were found to be neglected by their parents but there was hope that the home could be rehabilitated under the supervision of the court without removing the children from their parents' care permanently, the court, after a finding, could continue the case under supervision of the court or in the care of agencies or individuals.

Since the amendments of General Laws, Chapter 119 by Chapter 646 of the Acts of 1954 the court is required to appoint selected agencies, qualified as experts under Section 3 of Chapter 119, to make an investigation in each and every case. The results of their investigation, by the force of Section 3, become admissible as evidence and part of the record. As the law stands now amended this means that a court cannot proceed to adjudicate a case immediately, and thus preserve the rights of not only the children but of the parents. This is so because it takes at least three weeks to complete the required investigation, so that the parents in a given case might be deprived of their children without any recourse to law except through an extraordinary remedy such as habeas corpus. The requirement that this investigation shall be made before a court can hear the case can result in a grave injustice. Furthermore, it does not seem to serve any immediate good purpose in so far as the court is concerned. And again, as a judge I prefer not to have before me such an investigation before I hear the facts of the case because it may contain prejudicial matter.

Before the amendments of 1954 if in a given case the children were found to be neglected and the court felt that although they were neglected the appearance in court, the taking of jurisdiction over the parents, as well as the children, was sufficient in that the

parents, if given an opportunity, could reestablish their home, as well as rehabilitate themselves, with the help of the probation staff or agencies in the community, the court could commit the children temporarily to the care of the Department of Public Welfare and set a time to give parents the opportunity to reestablish a home for their children. Since the amendments the court is denied the right to act in this matter but required to commit the children permanently to the Department of Public Welfare. This deprives parents of their children and of the opportunity they previously had under law to rehabilitate themselves and reestablish their home without a complete severance of the rights of parents to custody and control of their children. Such a result, from our practical experience, destroys in many cases the element of hope that we can keep alive through our probation departments. Aside from the humane reasons, the economic reasons can be better served by permitting the court to continue cases after a finding with the children temporarily placed. This is more important at the moment because we have just accomplished, through legislation, a reorganization of the probation departments of the courts of the state, as well as made many of our district courts full time courts.

The most important consideration in restoring this right of temporary commitment to the Department of Public Welfare of certain children who are neglected is this:—As the law now stands the court could have two cases and have made findings that the children were neglected but see a hope of reestablishing the families, but could not realize the hope in one of the cases. In Case A, a relative, friend, or private agency, comes forward and says, "We believe that these parents if given time can rehabilitate themselves and reestablish their home." The court, under the present law as well as the old law, can place the children temporarily with the agency or with the people who came forward. In Case B, no agency, relative or friend (as is often the case) is available; yet there is just as much hope and possibility of rehabilitating the parents and reestablishing the home in this case. However, because these parents and their children have no one to come forward the law says we must commit them to the Department of Public Welfare permanently until their twenty-first birthday or until the Department of Public Welfare decides, not a court, that the children may be returned to their home.

In short, the present law has deprived the courts, without reason, of a disposition they previously had, and also it deprives unnecessarily, certain parents of their children by severing for all time their right to custody and control. Lastly, it stigmatizes the children in that it makes them state wards.

Prior to the amendments of 1954 a parent had the right, through furnishing bail or some form of surety, to the care, custody and control of his children until there was a judicial determination that he was unfit as a parent. Under the present law this is no longer so, and the court could before hearing of the facts take the children from their parents and later find that an injustice had been done because the hearing proved the parents as not unfit. Again we believe that parents should have this opportunity of custody of their children to prevent, as far as humanly possible, even one case of injustice.

Also the same situation can occur pending the hearing of an appeal to the decision of being unfit.

JOHN J. CONNELLY

TABLE SUBMITTED BY JUDGE CONNELLY

RECEIPTS

Boston Juvenile Court

(Probation Department)

Year	*Restitution*	*Support*	*Miscellaneous*	*Total*
1935	$80.23	$395.95	$78.25	$554.43
1936	105.95	280.00	46.25	432.20
1937	109.85	233.00	67.50	410.35
1938	69.96	389.50	30.50	489.96
1939	202.45	183.00	7.50	392.95
1940	154.24	—	8.00	162.24
1941	94.66	—	11.00	105.66
1942	145.85	—	9.00	154.85
1943	209.10	125.00	8.00	342.10
1944	445.00	2,130.53	74.00	2,649.53
	$1,617.29	$3,736.98	$340.00	$5,694.27
1945	$820.35	$2,325.60	$8.00	$3,153.95
1946	947.68	4,791.40	3.00	5,742.08
1947	883.48	6,173.38	—	7,056.86
1948	1,321.55	11,324.62	—	12,646.17
1949	1,020.90	11,797.56	20.00	12,838.46
1950	1,522.46	6,644.55	—	8,167.01
1951	969.45	6,314.75	3.28	7,287.48
1952	1,722.84	7,177.50	86.00	8,986.34
1953	1,413.16	10,303.38	251.00	11,967.54
1954	1,805.96	8,861.80	33.50	10,701.26
1955	1,345.15	5,472.32	38.00	6,855.47
	$13,772.98	$81,186.86	$442.78	$95,402.62
1956	$2,159.61	$7,559.63	$344.05	$10,063.29
1957	$1,427.26	$6,870.45	$64.50	$11,706.60
10 yr. period—1935-1944	$1,617.29	$3,736.98	$340.00	$5,694.27
10 yr. period—1945-1955	13,772.98	81,186.86	442.78	95,402.62
Total for 20 yrs.	$15,390.27	$84,923.84	$782.78	$101,096.89

APPENDIX C

Statement in Opposition to H. 1487, Submitted to the Judicial Council by Patrick A. Tompkins, Esq., Commissioner of the Department of Public Welfare

House Bill No. 1487, entitled, "An Act Relative to the Care and Protection of Children" has been referred to the Judicial Council for investigation of the subject matter involved. It has now become Chapter 24 of the Resolves of 1958.

Because this legislation is so important to the program of the Division of Child Guardianship and the care of children, we are submitting our thinking as presented to the Public Welfare Committee at the time the bill was heard.

In Section 24, line 25, this bill changes the word "shall" to "may." We feel that this is not sound because it is permissive rather than mandatory that a qualified person make a report to the court in order that a sound decision may be made regarding separation of the child from the family. Because this is of so much concern to us, we believe that the law should continue to be mandatory since it involves such a crucial decision in planning for the child.

In Section 25, line 9, it inserts "charitable corporation" which is an outmoded and not an exact description of the agencies involved and, therefore, should still remain "licensed agencies providing foster care for children."

In Section 25, line 10, again this bill inserts "charitable corporation" instead of "licensed agencies providing foster care for children" and adds "upon furnishing surety." We do not feel, nor can we understand why it would be necessary for the "suitable person" or "charitable corporation" to furnish surety, as it is not in the present law.

In Section 25, line 12, again the bill states "until surety is furnished." In this line it seems to us that a potential neglecting parent could take a child back out of the custody of the Department by furnishing bail and, as a matter of fact, this was done under the old law which provided surety. Again, we believe that this is not sound legislation in regard to caring for the needs of children.

In Section 26, line 6, the phrase "and said report is received" is eliminated. We think that the separation of a child from his family and the planning for a child in placement should be done with as much information as possible in order to make the most

constructive plan for all children. We, therefore, think this phrase should not be eliminated.

In Section 26, lines 11 and 12, beginning "and may further continue such petition" and continuing down to line 18 "as may be conducive to the best interests" is added to the present Section 26. Also, in lines 19 and 20, "or for a less time" is added. From our administrative point of view, this is not sound legislation because it divides responsibility for the care of these children between us and other agencies and also allows these cases to be held in continuance without making a final decision which means that no sound plan can be made for these children in a foster home.

We believe that if the decision is made upon a sound social investigation made by a qualified person in a report to the court and a thoughtful decision is made upon this information by the court, if the children are committed to the Department, we can definitely make constructive plans to take care of these children properly. The Department of Public Welfare is also vitally interested, and probably more so than any other agency, in continued working with the parents of these children in order to rehabilitate them, if at all possible. There is no finality in a commitment to the Department since over 40% of our children who are discharged are returned home to live in better circumstances with their parents.

We believe that the additions in this legislation are unnecessary since, in essence, any of the things that this law purports to do can be done under the present law.

We believe that the determination of neglect is a judicial function but that the placing in foster care of neglected children is the prime administrative responsibility of a child-placing agency—the Division of Child Guardianship. This is an accepted fact. The corresponding obligations of how long the child shall remain under the care of the Division and when he should be returned home have always been considered to be the prime responsibility of the administrative agency involved in child welfare rather than a judicial function.

We are sharing with you our evaluation of a law which has far reaching effects in regard to the foster care of children. If there is any way in which we can be of further assistance to you, please do not hesitate to call on us.

PATRICK A. TOMPKINS,
Commissioner

APPENDIX D

EXTRACTS FROM REPORT IN 1953 OF THE NEW YORK JOINT LEGISLATIVE COMMITTEE ON MOTOR VEHICLE PROBLEMS RELATIVE TO "CHEMICAL TESTS FOR INTOXICATION"

There is much evidence that leads to the conclusion that the intoxicated driver is the greatest single hazard on the highways of the nation. A study made by R. L. Holcomb in Illinois revealed that approximately one half of the drivers involved in personal injury accidents were drinking to some extent; the study also revealed that the chances of such drivers becoming involved in an accident increased as the amount of alcohol they imbibed increased.[1] John Grimm points out that the drinking driver is involved in fifty-five per cent of the traffic deaths, personal injuries and property damage accidents.[2] The 1952 edition of Accident Facts reports that in 22 out of 100 fatal accidents drinking was a cause.[3] Even these statistics do not reveal the whole story. In many accidents where drinking was a factor no mention of that fact was made. . . .

The successful prosecution of the drunken driver requires that law enforcement officials be able to identify him beyond a reasonable doubt. The method of identification presently used in most communities is totally inadequate. It usually takes the form of general observations by police officers and witnesses. These witnesses are asked to testify as to the presence or absence of the accepted signs of intoxication, the odor of the breath, slurred speech, hand tremors and clumsiness of movement. Alcoholism being a well-know disorder, it may be asked why anything more than this is necessary to prove that an individual has imbibed too freely. The answer is that these tests are not conclusive, since the common signs of intoxication have often been used to falsely accuse a sober person. A person's appearance and actions may be clearly abnormal, yet the abnormality may not be due to alcohol.

The test for odor of liquor on the breath is unsatisfactory for the breath odor observed is really the flavoring matter of the liquor and the strength of the odor depends not only on the amount of alcohol consumed, but also on the particular beverage which happened to have been used. Moreover, recent experiments with chlorophyll indicate that it is possible to produce intoxicating beverages which can be imbibed without leaving any odor in the breath.

Impairment of speech and locomotion may be due to any number of factors, other than excessive alcohol. It is obviously difficult for the arresting officer to know the accused's usual behavior. He often cannot tell, therefore, whether the accused's behavior at the time of apprehension is usual or unusual. This does not mean that such common signs of intoxication should be disregarded. It does indicate that these signs, without further evidence, do not show positively whether the individual was under the influence of intoxicating liquors. As a result, juries and judges are often loath to convict the guilty.

This uncertainty in the detection of excessive drinking need not exist, for

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[1] HOLCOMB, J. A., *Alcohol in Relation to Traffic Accidents*, 111 Journal of American Medical Association 1076 (1938).

[2] GRIMM, JOHN S., *Drunken Driver*, 43 Ohio Opinions 60, 61 (1950).

[3] National Safety Council, *Accident Facts*, p. 54 (1952).

truly scientific and reliable tests for determining intoxication have been developed. Medical science has devised methods of administering chemical tests to suspected drivers that determine the degree of their intoxication through the concentration of alcohol in their blood and other body fluids.

Needed—Protection of the Innocent

It is to be remembered, moreover, that chemical tests not only help mete out punishment to the guilty—they free the innocent. To protect the innocent it is necessary that testimony as to the existence of usual signs of intoxication be supplemented by evidence of a more scientific nature. A drunken driver can be jolted into sobriety by suddenness and shock resulting from an accident; but equally true is the fact that shock will often produce stupor, tremors, and other symptoms of intoxication in one who is perfectly sober. There are approximately 60 pathological conditions that have symptoms similar to those of alcoholism.[4] An apparent alcoholic condition might not be due to alcohol at all. It may be merely the result of injury or sickness. People taking medicines often act as if they had been imbibing too freely. A diabetic in need of, or with an overdose of, insulin may act as if he were intoxicated. Injuries to the nervous system or a concussion of the brain may create alcoholic symptoms.[5] Hence it is evident that not even a physician—on observation alone—is able to accurately diagnose intoxication. How then can a law enforcement official without any medical training be expected to make a determination as to intoxication which can be supported in court by a finding beyond a reasonable doubt? The answer is, obviously, that he cannot do so without the aid of chemical tests.

Laws Permitting Use of Chemical Tests

The National Safety Council's report for 1951 reveals that in 1951 the law enforcement agency or agencies of forty-two states used chemical tests to take the guesswork out of judging whether or not a driver was under the influence of liquor. In those forty-two states, 242 cities reported using the tests, which was an increase of 45 per cent over the 167 cities using the tests during 1950. Though chemical tests are used in forty-two states, only fourteen states have legislation on the subject.[6] These laws deal only with admissibility of results of chemical tests when they have been made. No law provides for the taking of these tests.

New York State was one of the pioneers in passing legislation permitting the introduction of these tests in evidence. The New York statute is based on the one recommended for adoption by the President's Highway Safety Conference, the American Medical Association's Committee on Street and Highway Accidents, and the National Safety Council's Committee on Tests for Intoxication. Embodied in section 70(5) of the Vehicle and Traffic Law, it provides as follows:

> "Upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person arrested for operating a motor vehicle or motor cycle while in an intoxicated condition, the court may admit evidence of the alcohol in the defendant's blood taken within two hours of the time of

[4] Donigan, R. L., *Chemical Test Case Law*, p. 2. Evanston (1950).

[5] Muehlberger, C. W., *Alcohol and Traffic Accidents*, p. 3 (Mimeographed material distributed by Traffic Institute, Northwestern University).

[6] *Uses of Chemical Tests for Intoxication in 1951*. Report of Committee for Tests for Intoxication, National Safety Council. Chicago (1952).

the arrest, as shown by a medical, or chemical analysis of his breath, blood, urine, or saliva. For the purposes of this section (a) evidence that there was, at the time, five-hundredths of one per centum, or less, by weight of alcohol in his blood, is prima facie evidence that the defendant was not in an intoxicated condition; (b) evidence that there was, at the time, more than five-hundredths of one per centum and less than fifteen-hundredths of one per centum by weight of alcohol in his blood is relevant evidence, but it is not to be given prima facie effect in indicating whether or not the defendant was in an intoxicated condition; (c) evidence that there was, at the time, fifteen-hundredths of one per centum, or more, by weight of alcohol in his blood, may be admitted as prima facie evidence that the defendant was in an intoxicated condition."[7] . . .

There is little doubt that today these chemical tests have reached sufficient standardization and general acceptance so as to entitle them to admission in evidence.[8] The authorities are agreed that the chemical test is of definite corroborative value. It can be unequivocally stated that chemical tests as compared with the older methods render the diagnosis of alcoholic effects more precise and mistakes against the accused less likely.[9] And, as already noted, a statute permits the results of these tests to be admitted in evidence. Even with this statute, the prosecution must still prove that the test was given with a high degree of care and precision and that little possibility of error exists.

The chemical tests have encountered no difficulty in the courts where the test was taken *with the consent* of the accused. They have admitted the results of tests of blood, urine and breath. The only question which arises is whether an individual can be *compelled to submit to a test* and whether the evidence so obtained be admissible.

SCIENTIFIC BASIS FOR LEGISLATION

How the Tests Work

For an understanding of the manner in which chemical tests operate, it is necessary to understand the effect of alcohol on the nervous system and to trace its course through the human body. Alcohol is the only substance in beverages which has an intoxicating effect. A given amount of alcohol has the same effect on the human system whether consumed alone or mixed with other beverages. When an individual drinks a beverage which contains alcohol the alcoholic content of the beverage is absorbed into his bloodstream mainly through the small intestines and the stomach where the absorption process is rapid. Food in the stomach will delay the absorption process for it retards the alcohol from coming into contact with the intestinal walls. Where there is an absence of food in the stomach, half the alcohol is absorbed into the bloodstream within fifteen minutes and all of it is absorbed within two hours. The alcohol in the blood is then carried to all parts of the body through the bloodstream.

The various parts of the body take up the alcohol in proportion to their

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[7] N. Y. Vehicle and Traffic Law § 70(5).

[8] Ladd and Gibson, *Medico Legal Aspects of the Blood Test to Determine Intoxication*, 24 Iowa Law Review 191 (1939); Bogen, E., *Human Toxicology of Alcohol*, Alcohol and Man. p. 126 (1932); Heise and Hulpieu, *Medico-Legal Aspects of Drunkenness*, 36 Penn. Med. J. 190 (1939).

[9] Muehlberger, C. W., *Alcohol and Traffic Accidents*, *op. cit.*, p. 11.

water content. The brain, liver, and blood have the same fraction of water content and, therefore, hold about the same per cent of alcohol. Urine, saliva, and spinal fluid, having a higher water content, hold a higher per cent of alcohol. The decrease of alcohol in the body which takes place because of oxidation and excretion occurs at practically the same rate throughout the body.[10]

The intoxicating effect is produced by the alcohol stored in the brain; the degree of intoxication is thus proportional to the per cent of alcohol stored there.[11] Since the relation of alcohol in other parts of the body to that in the brain remains constant, the per cent of alcohol in the brain can be determined by measuring alcohol in other parts of the body. Thus a determination as to the per cent of alcohol in the brain is made possible by testing other body materials. The body substances most commonly used are blood, urine, and breath, although saliva may be used.

What the chemical tests show is the per cent of alcohol in the body material tested. This percentage is arrived at by the following steps:

1. The amount of the substances to be analyzed is measured (by its weight or volume).
2. After the substance is measured, the alcohol is separated and isolated from the rest of the specimen (by distillation or aeration).
3. The alcohol thus isolated is measured.[12]

If urine or breath is the body substance used, the measurement arrived at is translated into a figure representing the concentration of alcohol in the blood. This computation is possible because the alcohol ratio in all parts of the body remains constant. When we arrive at the blood alcohol concentration figure we can determine how much alcohol is stored in the brain.

It must be emphasized that the test does not determine the amount of alcohol consumed, but rather the amount of alcohol absorbed in the brain at the time the test is given. This is important for it is the alcohol in the brain, not the amount consumed, that affects the driver's nerves and his mental and physical faculties.[13]

For a discussion by doctors and lawyers on chemical tests, see 14 Maryland Law Review, No. 2 (1954), 111-146. The matter is also discussed in 23 Tennessee Law Rev. (1954), 178-195.

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[10] HARGER, R. N., *Some Practical Aspects of Criminal Tests for Intoxication*, 35 Journal of Criminal Law and Criminology, 202-204 (1944).

[11] *Ibid.*, 204-205; MONROE, D. G., *Drinking Driver: Problems of Enforcement*, 8 Quarterly Journal of Studies on Alcohol, 385 (1947).

[12] MUEHLBERGER, C. W., *Fundamental Principles Involved in the Measuring of Alcohol Concentration* (Mimeographed material distributed by the Traffic Institute, Northwestern University).

[13] DONIGAN, R. L., *op. cit.*, p. 2.

APPENDIX E
CHEMICAL TEST CLINIC, HOLY CROSS COLLEGE, APRIL 24, 1957

PORTO CLINIC TESTS

Subject Number	*Braking Time (Allow. .49)*	*Depth Perception (Allow. 3 in.)*	*Side Vision (Allow. 75-75)*	*Visual Accuity (Allow. 20/40)*	*Color*
#2					
Before Drinking	.39	3/8 inch	83-89	20/20	Normal
After Drinking	.43	1 3/8 inches	83-89	20/20	Normal
#4					
Before Drinking	.38	1 3/8 inches	90-93	20/20	Normal
After Drinking	.60	2 inches	85-89	20/20	Normal
#6					
Before Drinking	.38	1½ inches	95-95	20/20	Normal
After Drinking	.75	9¼ inches	87-90	20/20	Normal
#8					
Before Drinking	.36	2¾ inches	94-95	20/20	Normal
After Drinking	.56	5½ inches	85-86	20/20	Normal

TESTS FOR ALCOHOL CONTENT IN BLOOD (hundredths of 1%)***

Subject Number	*Whiskey Consumed*	*Drunkometer*	*Breathalyzer*	*Urine Test*
#2	2 ounces	.06	.05	**
#4	4 ounces	.08	.08	**
#6	6 ounces	.10	.09	**
#8	8 ounces	.17	.17	.17

SPONSORED BY
WORCESTER COUNTY SAFETY COUNCIL
WORCESTER, MASSACHUSETTS

* In hundredths of second.

** Dr. Casale reported tests of urine specimens on No. 2, No. 4, and No. 6 were in close conformity to the breath tests and that urine test on No. 8 was in exact conformity.

*** From .05-.15 subject might be "under the influence." Above .15 definitely "under the influence."

APPENDIX F

On House 1987 (Recommended for passage, see p. 39.)

RELATIVE TO AGENCY AND OTHER FIDUCIARY POWERS IN TIME OF ATOMIC EMERGENCY

By

JAMES W. PERKINS AND LIVINGSTON HALL

[A redraft of an article originally appearing in the Massachusetts Law Quarterly, March 1957.]

Introduction

Though we hope devoutly that an atomic attack may never be launched against this country, the chance that it will be is not so remote that we can afford to disregard it. Advance planning by private citizens could reduce the hardship and confusion that an attack would cause. House, No. 1987 of 1958 was drafted to facilitate such planning.

The problem of civil defense against atomic attack can be divided into three portions: 1) evacuation and shelter from blast, heat and radiation; (2) the furnishing of food, clothing and housing to refugees on a temporary emergency basis; and (3) the revival of business so that the survivors can continue to obtain necessary goods and services.

House, No. 1987 concerns the third portion, the revival of business. We could make no special provision for this and wait for the government to recreate the nation's business. But we believe that it would be much faster and more effective and more in keeping with our American traditions to make maximum use of individual initiative in the resuscitation of economic life.

In order to provide individual incentive and responsibility for the revival of trade and industry, an earlier 1957 bill (Senate No. 309) was drafted to set up machinery whereby agents could carry on the business affairs of persons killed, incapacitated or missing as the result of atomic attack. The 1958 act has been drawn to cover other fiduciaries as well as agents. It would add new Sections 7-14 to G. L. Chapter 104.

The Agency Rule that normal agency powers automatically terminate without notice upon death of the principal has been termed "shockingly inequitable" by Professor Seavey, see The Rationale of Agency, 1920, 29 Yale L. J. 859 at 893. It has been modified as to partnerships in the Uniform Partnership Law, and has been changed as to all agents in at least one state, see Wisconsin Laws 1943, Chapter 49. Limited relief from the harsh effects of this rule was given during World War II by statutes enacted in a dozen states providing that servicemen's powers of attorney should terminate only upon notice of death.

James W. Perkins, a Boston attorney, first called attention to the need of statutory modification of this Agency Rule in Massachusetts in the event of an atomic attack against the United States. In September 1956, he wrote to enlist the support of Associate Dean Cavers of the Harvard Law School, who was a member of the American Bar Association's Special Committee on the Impact of Atomic Attack on Legal and Administrative Processes. During the next few months Perkins drafted Senate, No. 309, with the collaboration of Associate Dean Cavers, Vice Dean Hall, Professor Herwitz, and Robert P. Moncreiff, 3L, of the Harvard Law School. In 1957 a separate act was prepared by a drafting group at Harvard Law School covering the administration of trusts in time of atomic emergency. The two acts were then merged and expanded to cover guardians, conservators, executors and administrators and the 1958 act is the result of these labors.

Admittedly this bill covers only a small part of the overall problem. It does not cover individuals who have no agents or other fiduciaries and appoint none under Section 9. The affairs of such individuals, if they are killed, incapacitated or missing, may have to be administered by a system of public authority. But it does meet a part of the overall problem satisfactorily, and it contains no provision which should be controversial. We believe that it is better to make a small start which fully covers a part of the problem than to make no start at all. If a bill like this can be passed, we hope it will create interest in going on to a full preparation against atomic attack throughout the rest of the country, as well as in Massachusetts.

1. *What are the Background, Purposes and Content of the Draft Act?*

The Agency Rule as expressed in technical terms is as follows: "The death of, or loss of capacity by, a principal terminates his agents' authority and apparent authority without notice." (Restatement of Agency, ss. 120, 122, 133.) (The same would be presumably true as to the powers of a guardian or conservator upon the ward's death or of the agent of any fiduciary upon the fiduciary's death.)

The intent and purpose of the Rule are simple. The Rule exists to protect the interests of the family and creditors of a deceased principal by giving sole power to bind his estate to his executor or administrator, who act subject to the control of the Probate Court. But undesirable applications on the Rule have developed. These would have paralyzing effects in the event of an atomic emergency. The following are examples, together with the cure provided by this Draft Act:

Case (a): Communications with the area in which the principal is living are cut off as a result of enemy action during a period of atomic emergency and ar

undetermined number of the inhabitants are killed. Agents have important interests of the principal committed to their charge, to protect which immediate action is required. But they cannot act safely, even though it should later turn out that the principal had not been harmed. The reason is that both the agents and the third persons with whom they might wish to deal could not act legally if it turned out that the principal was already dead, even though there was no way in which they could have had notice of his death at the time.

The Cure: Section 8 (added to G. L. Chapter 104 by Section 1 of the Draft Act) provides that under such circumstances any authority previously given by the principal to his agents "shall continue regardless of the death or loss of capacity . . . of any . . . principal." Thus both agent and third person would be protected whether the principal is in fact dead or not. Section 8 would similarly continue the powers of guardians and conservators.

Case (b): An agent in charge of a business learns that his principal has been killed during a period of atomic emergency, and that as a result of the emergency the Probate Courts are closed for an indefinite period. There is no way in which the agent can legally continue to operate the business, no matter how important it may be to the community, until the Probate Courts have re-opened and an executor or administrator has been appointed.

The Cure: Section 10 (added to G. L. Chapter 104 by Section 1 of the Draft Act) provides for continuation of such an agent's power to bind his principal until "knowledge of the appointment . . . of any . . . personal representative qualified and able to exercise the powers involved" comes to the agent or third person, as the case may be.

Case (c): The principal and all his agents are killed during a period of atomic emergency. There is no way under present law by which the principal can designate other persons to carry on his affairs until the Probate Courts can be re-opened and appoint an executor or administrator to handle his estate.

The Cure: Section 9 (added to G. L. Chapter 104 by Section 1 of the Draft Act) empowers a principal by a power of attorney to authorize another to act "as his agent, during a period of atomic emergency . . . regardless of the death or loss of capacity." Section 9 would also permit trustees and other fiduciaries to make similar emergency arrangements.

2. *Can These Difficulties be Met by the Courts without Legislation?*

The law of Agency is well developed in Massachusetts by the Supreme Judicial Court. . . . Neither the Court nor the Agency Restatement has yet taken a position on the effect of an atomic emergency. There is no way by which lawyers and businessmen can foretell in advance what the courts of Massachusetts (or any other state) would do if an atomic emergency were to occur. It is vitally important that interested parties know *now* what steps can be taken in advance to safeguard their interests in such a case. Further, the legal consequencies of a possible atomic emergency on the rights and duties of agents and those who deal with them should be established and understood before the emergency arises. Under present law this Agency Rule of termination of authority on death, recognized in *Gallup* v. *Barton*, 313 Mass. 379, 47 N. E. 2d 921, 1934, is subject to only two exceptions:

Exception (a): The authority of a bank to pay checks drawn by the depositor continues after the death of the depositor, until the bank has notice thereof, see *Glennan* v. *Rochester T. & S. Co.*, 209 N. Y. 12, 102 N. E. 537, 1913. (In Massachusetts by G. L. Chapter 107, Section 17, enacted in 1885, a 10 day period after death is allowed even after notice of death.) No other kinds of authority are covered by this exception, however.

Exception (b): A "power coupled with an interest" will survive the death of the giver of the power, see *Mulloney* v. *Black*, 244 Mass. 391, 138 N. E. 584, 1923. But this exception is no help at all in the ordinary agency case, for it applies only to irrevocable powers given as security for the benefit of the holder of the power, including powers such as judgment notes, power of sale mortgages, and other similar non-agency powers.

3. *Who will Benefit from the Draft Act?*

Principals, wards, beneficiaries and their families and others interested in their estates, will profit from the provisions which permit action to be taken by their agents and other fiduciaries to protect their interests during a period of atomic emergency. Fiduciaries will be free to continue to act and to receive compensation for doing so, regardless of the death or loss of capacity of their principals or wards. Third persons will know that they can deal in safety with fiduciaries in spite of the uncertainties created in such an emergency. And the public welfare will also be served, since the Draft Act creates a legal means of continuing to operate vital businesses in spite of the death or loss of capacity of their proprietors.

4. *Does the Draft Act go Far Enough?*

It modifies the law in two important respects during the period of an atomic emergency:

(1) It provides for agents, guardians and conservators to continue to exercise their pre-existing authority, regardless of the death or loss of capacity of their principals or wards; and

(2) It permits principals and certain fiduciaries to give written authority to act on their behalf, effective upon the occurrence of an atomic emergency, to others who were not theretofore their agents.

It has been suggested that it should also provide some form of public authority under the Probate Courts to exercise general agency powers for the estates of persons whose affairs were not included under either (1) or (2) above. This further step appears to be more suitable for consideration as a part of a general plan of extension of governmental powers during an atomic emergency.

This Draft Act is thus well adapted for immediate enactment to cover the fields of agents and other fiduciaries.

5. *Does the Bill Interfere with the Administration of Estates by the Probate Courts?*

The idea of relying on appointments by the Probate Courts or by some substitute for the Probate Courts has been discussed. It might be wise to draft provisions along these lines. But there is no assur-

ance that the Probate Courts would continue to exist in the event of an atomic attack, and an elaborate system of substitutes would be required. This would be necessary and desirable as to persons who neither have agents or other fiduciaries nor appoint special agents under Section 9. But we believe it is better to meet the problem with individual rather than bureaucratic initiative so far as possible. The Draft Act represents organization from the grass roots rather than from the top. It would be effective immediately in the event of atomic war. Resort to governmental authority might take months.

The Draft Act would supplement the existing powers of the Probate Courts to care for the estates of persons where death or loss of capacity occurs to make this necessary. If the Probate Courts are not closed down or overwhelmed with cases as a result of an atomic emergency, the Draft Act will have little effect. Two provisions in Section 10 were inserted to make this clear.

(a) During an atomic emergency, the continuing powers of the agent, conservator or guardian terminate whenever he or a third person acts with knowledge of the appointment by the Probate Court of a representative qualified to act.

(b) By proclamation, the effect of the Act can be terminated whenever the governor or other authorized public official decides that the facilities of the Probate Courts are adequate, through the appointment of special administrators and other measures, to meet the legal problems presented by the occurrence of the atomic emergency.

Whenever the Probate Courts are not able to meet the emergency, the provisions of the Draft Act would help to do so by use of continuing fiduciary powers. Even special administrators cannot act as such under G. L. Chapter 173 until they receive appointment from some judge of the Probate Court under Section 10, and they cannot legally continue the business for the benefit of the estate without authorization of the Probate Court under Section 12. Some machinery is needed to fill the gap between commencement of an atomic emergency, and the time when the Probate Courts are able to handle the resulting problems effectively and promptly.

But the final paragraph of Section 10 makes clear that the Draft Act is not meant to go further than this. It is not intended that a power of attorney or other agency device should be used, in place of a Will or Trust, to govern the ultimate distribution of the principal's assets after his death, except to the limited extent that Section 11 (f) would permit a principal to authorize an agent to continue during the emergency "such provisions for the support of the dependents of the principal as the principal was accustomed to make." This provision does no more than to maintain the *status quo* for the family and other dependents.

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